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ORDER OF COURT.

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Friday, the 24th day of January, 1868.

The Right Honourable Frederic Baron Chelmsford, Lord High Chancellor of Great Britain, with the advice and assistance of The Right Honourable John Lord Romilly, Master of the Rolls, The Right Honourable Hugh McCalmont Lord Cairns, one of the Lords Justices of the Court of Appeal in Chancery, The Honourable the Vice-Chancellor Sir John Stuart, The Honourable the Vice-Chancellor Sir William Page Wood, and The Honourable the Vice-Chancellor Sir Richard Malins: doth hereby, in pursuance and execution of the powers given by the Statute 30th and 31st Victoria, chapter 127, and of all other powers and authorities enabling him in that behalf, order and direct in manner following:—

PART I.

SCHEMES OF ARRANGEMENT.

PREPARATION AND FILING OF SCHEME.

1. Every Scheme to be filed in the Court of Chancery pursuant to the Statute 30th and 31st Victoria, chapter 127, section 6, and every Declaration, Affidavit, Petition, Summons, Notice, or other proceeding relative thereto, shall be intituled in the matter of "The Railway Companies Act, 1867," and in the matter of the company in question.

2. Every such Scheme shall be marked either with the words "Lord Chancellor" and the name of one of the Vice-Chancellors, or with the words "Master of the Rolls," and the matter of such

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Scheme (unless removed by some special Order of the Lord Chancellor or the Lords Justices), shall accordingly be attached to the Court of such Vice-Chancellor, or to the Court of the Master of the Rolls, as the case may be, in like manner and for the same purposes as Causes are attached to a particular Court.

3. Every Scheme to be filed as aforesaid shall be printed on paper of the same size and description, and in the same style and manner, as Bills in Chancery are required to be printed, or shall be written bookwise upon paper of the same size and description as last aforesaid.

4. Every Declaration and Affidavit to be filed as mentioned in the 6th section of the said Act, shall be written bookwise upon paper of the same size and description as that on which Bills are printed.

5. Every such Scheme shall be filed in the office of the Clerks of Records and Writs, and the Declaration and Affidavit required by section 6 of the said Act shall be annexed to such Scheme, and filed at the same time therewith, and the Clerks of Records and Writs shall not file any such Scheme unless accompanied by such Declaration and Affidavit.

6. There shall be indorsed upon every Scheme so filed as aforesaid the name and address of the Solicitor and London Agent (if any) of the Company, and also the address for service of such Solicitor in cases where an address for service is required by the General Orders of the Court.

7. Where a written Scheme is filed, the person bringing the same to be filed shall, at the same time, leave with the Clerks of Records and Writs a fair copy thereof, and the Clerks of Records and Writs are to examine such copy with the Scheme filed, and return it so examined with a certificate thereon that it is correct and proper to be printed.

8. The Directors are then to cause the Scheme to be printed

from such certified copy, on paper of the same size and description, and in the same type, style, and manner, as Bills are required to be printed, and, before the expiration of four days from the filing of the Scheme, are to leave a printed copy thereof with the Clerks of Records and Writs, with a written certificate thereon by the Solicitor of the Company that such print is a true copy of the Scheme so certified, and after the expiration of such four days no evidence of the Scheme having been filed shall be admissible until such printed copy thereof has been filed. 1868

9. Every fifth line of each page of a printed Scheme shall be numbered.

COPIES OF SCHEME.

10. At any time after the expiration of four days from the filing of a Scheme, whether printed or written, any person may demand, by a requisition in writing, delivered at the principal office of the Company, or at the office of their Solicitor, or of his London Agent (if any), any number not exceeding ten of printed copies of the Scheme, and the copies so required shall on such demand be delivered to the person so requiring the same, with a written certificate thereon by the Solicitor of the Company that they are true copies of the Scheme filed.

11. Every such copy is on delivery to be paid for at the rate of one halfpenny per folio, except in the case provided for by the 20th section of the said Act, in which case it is to be paid for at the rate prescribed by the said Act.

NOTICE OF FILING SCHEME.

12. The Notice, to be published in the "Gazette," of the filing of the Scheme shall be signed by the Solicitor of the Company, or his London Agent, and shall state whether the Scheme contains any provisions for settling and defining any rights of Shareholders among themselves, or for raising any and what amount of share or

1868 loan capital, and which; and shall set forth the name and address of the Solicitor and London Agent (if any) of the Company, and may be in the Form No. 1 in the 3rd Schedule hereto, with such variations as the circumstances of the case may require.

CERTIFICATE OF FILING.

13. When a Scheme has been filed, one of the Clerks of Records and Writs shall, at the request of any person, give and sign a Certificate of the filing thereof, or of the filing of a printed copy thereof; and such Certificate may be in the following form, with such variations as the circumstances of the case may require :—

In the Matter of "The Railway Companies Act, 1867," *and In the Matter of The Railway Company.*

I do hereby certify that a [printed *or* written, *as the case may be*] Scheme of Arrangement between the above-named Company and their Creditors, under the Statute 30 and 31 Victoria, chapter 127, section 6, was, on the day of 18 , duly filed in the High Court of Chancery in England, together with the Declaration and Affidavit required by the said Statute [and that a printed copy of such Scheme was on the day of , duly filed in the said Court pursuant to the General Order of Court made in that behalf], as appears by my Book. Dated, &c.

A. B.,
Clerk of Records and Writs, of the High Court of Chancery in England.

RESTRAINING ACTIONS AFTER SCHEME FILED.

14. No Order, under section 7 of the said Act, for restraining an Action against the Company, by reason of a Scheme having been filed, shall be made, except on an undertaking by the Com-

pany to be answerable in such damages (if any) as the Court, or the Judge in Chambers, may think fit to award in the event of the Plaintiff being ultimately held entitled to proceed with such action; and on such further terms (if any) as the Court or Judge may think reasonable. 1868

PETITION FOR CONFIRMATION OF SCHEME.

15. Every Petition for confirmation of a Scheme shall be presented by the Directors or the major part of them. Such Petition shall not set forth the Scheme, but only refer thereto; and may be in the Form No. 2, in the Third Schedule hereto, with such variations as the circumstances of the case may require.

16. The Petitioners presenting such Petition as aforesaid shall, for the purposes of such Petition, be treated as representing the Company, and the Company shall not otherwise appear on the hearing of such Petition.

17. When any Petition to confirm a Scheme is presented, the Directors shall apply to the Judge in Chambers to appoint the day on which the same is to come into the paper for hearing, such day not to be before the expiration of three weeks from the time of such application, and shall cause a Notice of the presentation thereof to be inserted as follows (that is to say):—

(1) In the case of a Company whose principal Office is within ten miles from the General Post Office, in the "London Gazette," and in such two London daily morning newspapers as the Judge in Chambers shall direct.

(2) In the case of any other Company, in the "London Gazette," and in such two local newspapers circulating in the district where the principal Office of such Company is situate as the Judge in Chambers shall direct.

Such Notice shall state the day on which the Scheme was filed, and the day on which the Petition was presented, and the day on which the same is directed to come into the paper for hearing, and the name and address of the Solicitor and London Agent (if any)

1868 of the Company, and may be in the Form No. 3, in the Third Schedule hereto, with such variations as the circumstances of the case may require.

18. The Petition shall not come on to be heard until at least fourteen clear days after the insertion of such Notice as aforesaid. Such Notice shall, at least once in every entire week, reckoned from Sunday morning to Saturday evening, which shall have elapsed between the time of the first insertion thereof and the day on which such Petition is directed to come into the paper for hearing, be again inserted in such two London or local newspapers as aforesaid on such day or days as the Judge in Chambers shall direct.

19. Any Creditor, Shareholder, or other party whose rights or interests are affected by such Scheme, and who shall be desirous to be heard in opposition to the confirmation thereof, shall, at least two clear days before the day on which the Petition for confirmation is directed to come into the paper for hearing, enter an appearance at the Office of the Clerks of Records and Writs; and, in default of so doing, shall not be entitled to be heard, unless by the special leave of the Court.

20. Any person so entering an appearance shall be deemed to have submitted himself to the jurisdiction of the Court as to the payment of costs and otherwise.

CONFIRMATION OF SCHEME.

Annulled 25 Car. 2. c. xiv. Ord. Eq. 1850 r. 61 & 11 & 12 Vict. c. 145

21. No Scheme shall be deemed to have been confirmed by the Court of Chancery until an Order for confirming the same has been inrolled.

Annulled see above

22. Notice of any Order for confirming a Scheme shall, at least once in every entire week, reckoned from Sunday morning to Saturday evening, which shall elapse between the pronouncing of such Order and the expiration of thirty days from the pronouncing thereof, be inserted in such two newspapers as shall have been

A Scheme under the Companies Act 1867 shall be enrolled in the Enrolment Department of the Central Office (Ord. Eq. 1850 r. 61 & 11 & 12 Vict. c. 145.

A Scheme under that Act shall not be enrolled unless a majority of the creditors or class of creditors present at the meeting or at one of the meetings convened for the purpose, agree to the Scheme by the prescribed majority

appointed by the Judge for the insertion of advertisements under the 17th Rule hereof. And the Clerk of Records and Writs shall not give his Certificate that the docket of the inrolment of any such Order is correct, unless the newspapers containing such Notices be produced to him when the docket of such inrolment is presented to him for inspection. 1868

23. No Order for confirming a Scheme shall be inrolled until the expiration of thirty days from the day of the same having been pronounced, exclusive of vacations.

24. No Caveat shall be entered to stay the inrolment of any Order for confirming a Scheme, but every such Order may be inrolled at the expiration of thirty days from the day of the same being pronounced, unless in the meantime a Petition for a rehearing shall have been presented, and an Order for setting down such Petition obtained and served, such thirty days to be exclusive of vacations.

25. No Petition for a rehearing either before the same Judge or before the Lord Chancellor or the Lords Justices, of the case on which any Order for confirming or Order refusing to confirm a Scheme has been made, shall, unless by the special leave of the Lord Chancellor or the Lords Justices, be presented after the expiration of thirty days, exclusive of vacations, from the day on which such Order was pronounced, notwithstanding that such Order may not have been inrolled.

26. Where an Order has been made for confirming a Scheme, no person who has neither entered an appearance as aforesaid, nor by virtue of such special leave as aforesaid, been heard in opposition to the confirmation of the Scheme, shall be at liberty to present a Petition for rehearing before the same Judge or before the Lord Chancellor or the Lords Justices, unless the Lord Chancellor or the Lords Justices shall by special Order, to be applied for by motion on notice to the Company to be served on their Solicitor, or at their principal Office, give leave to such person to present a Petition for a rehearing. (t)

(t) Leave refused Re Devon & Somerset Wy Co

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27. Where any Petition for a rehearing of a Petition for confirmation of a Scheme is presented, the same Certificate of Counsel, the same subscription by the Petitioner or his Solicitor with respect to costs, and the same deposit, shall be requisite as are required for a rehearing when a decree has been made at the hearing of a cause.

28. The inrolment of a Scheme in pursuance of the 18th section of the said Act shall be effected in the same manner as the inrolment of a deed directed by Statute to be inrolled in the Court of Chancery.

PART II.

PROTECTION OF ROLLING STOCK AND PLANT.

29. Every Petition under "The Railway Companies Act, 1867," section 4, shall be intituled in the matter of the Act and in the matter of the Company in question, and shall be marked either with the words "Lord Chancellor," and the name of one of the Vice-Chancellors, or with the words "Master of the Rolls."

30. Such Petition shall be served on the Company only, but the Court may at the hearing, if it shall so think fit, adjourn the same for the purpose of service on such other parties, if any, as the Court shall think fit.

31. Every Order appointing a receiver or manager under the last-mentioned section shall direct such accounts and inquiries as the Court may think fit for ascertaining the debts of the Company and the rights and priorities of the persons interested in the moneys to come to the hands of such receiver or manager.

32. Every summons in Chancery under "The Railway Com-

panies Act, 1867," section 5, shall be intituled in the matter of the said Act and in the cause or matter in which the execution in question was issued, and such summons shall be issued out of the Chambers of the Judge to whose Court such cause or matter is attached, and such rules and practice of the Court of Chancery as are applicable to summonses for the purpose of proceedings not originating in Chambers, and to the proceedings thereunder, shall be applicable to such summons and the proceedings thereunder. 1868

PART III.

GENERAL PROVISIONS.

33. All Orders made in Chambers under "The Railway Companies Act, 1867," shall be drawn up in Chambers, unless specially directed to be drawn up by the Registrar, and shall be entered in the same manner and in the same Office as other Orders drawn up in Chambers.

34. In cases not expressly provided for by the said Act or by the Rules of this Order, the General Orders and practice of the Court (including the course of proceeding and practice in the Judges' Chambers, and the course of proceeding and practice as to rehearings before the same Judge, or before the Lord Chancellor or Lords Justices) shall, so far as such General Orders and practice are applicable and not inconsistent with the said Act or this Order, apply to all proceedings in the Court of Chancery under the said Act.

35. The power of the Court and of the Judge in Chambers to enlarge or abridge the time for doing any act or taking any proceeding, to adjourn or review any proceeding, and to give any direction as to the course of proceeding, shall be the same in pro-

1868 ceedings in Chancery under the said Act, as in proceedings under the ordinary jurisdiction of the Court.

36. Solicitors shall be entitled to charge and be allowed the fees set forth or referred to in the First Schedule hereto, unless the Court or Judge shall otherwise specially direct.

37. The fees of Court set forth and referred to in the Second Schedule hereto shall be paid in relation to proceedings in Chancery under the said Act, and shall be collected by means of stamps in manner provided by the General Orders of the Court.

38. The general interpretation Clause contained in the Consolidated Orders of the Court of Chancery shall extend and apply to this Order, and this Order shall be deemed one of the General Orders of the Court.

39. This Order shall come into operation on Monday, the 3rd day of February, 1868, and shall apply to all Schemes filed under the said Act, and to all proceedings in Chancery to be had under the same Act, Provided always that all proceedings taken under the said Act before this Order shall have come into operation shall have the same validity as they would have had if this Order had not been made.

THE FIRST SCHEDULE.

FEES AND CHARGES TO BE ALLOWED TO SOLICITORS.

For all duties performed under "The Railway Companies Act, 1867," such of the Fees on the higher scale authorized by the 2nd Rule of the 38th of the Consolidated Orders and the Regulations as to Solicitors' Fees subjoined thereto, as are applicable, unless the Court or Judge shall otherwise specially direct.

THE SECOND SCHEDULE.

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FEES TO BE COLLECTED BY MEANS OF STAMPS.

	£	s.	d.
In the Judges' Chambers.			
Such of the Fees as are directed to be paid and collected by the 2nd Rule of the 39th of the Consolidated Orders, and the Regulations subjoined thereto, as are applicable.			
In the Registrars' Office.			
Such of the Fees as are directed to be paid and collected by the 2nd rule of the 39th of the Consolidated Orders, and the Regulations subjoined thereto, as are applicable.			
In the Record and Writ Clerks' Office.			
For filing every Scheme of Arrangement . . .	1	0	0
For every Certificate of filing a Scheme of Arrangement	0	5	0
Such other Fees as are directed to be paid and collected by the 2nd Rule of the 39th of the Consolidated Orders, and the Regulations subjoined thereto, as are applicable.			
In the Examiners' Office.			
Such of the Fees as are directed to be paid and collected by the 2nd Rule of the 39th of the Consolidated Orders, and the Regulations subjoined thereto, as are applicable.			
In the Taxing Masters' Office.			
Such of the Fees as are directed to be paid and collected by the 2nd Rule of the 39th of the Consolidated Orders, and the Regulations subjoined thereto, as are applicable.			
In the Office of the Lord Chancellor's Principal Secretary.			
For every Petition	1	0	0
In the Office of the Secretary at the Rolls.			
For every Petition	1	0	0

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THE THIRD SCHEDULE.

No. 1. *Advertisement of Scheme.*

[*See Rule* 10.]

In the Matter of the Railway Company; and In the Matter of "The Railway Companies Act, 1867."

Notice is hereby given, that on the day of 18 , a Scheme of Arrangement between the above-named Company and their Creditors [*state here whether the scheme contains or not any provisions for settling the rights of any and what classes of shareholders as among themselves, or for raising additional share or loan capital, and which, and to what extent*] was filed in the Court of Chancery, and a copy of the said Scheme will be furnished to any person requiring the same by the undersigned, or at the Office of the Company, at , on payment of the regulated charges for the same.

A. and *B.*, of [Agents for *C.* and *D.*,of], Solicitors for the Company.

No. 2. *Petition to confirm Scheme.*

[*See Rule* 15.]

In the Matter of the Railway Company; and In the Matter of "The Railway Companies Act, 1867."

To the Right Honourable the Lord High Chancellor of Great Britain [*or*, to the Right Honourable the Master of the Rolls, *as the case may be.*]

The humble petition of , Directors of the above-named Company,

Sheweth,

That on the day of , the Directors of the above-named Company filed in this Honourable Court a Scheme of Arrangement between the above-named Company and their creditors.

Your Petitioners therefore humbly pray that the Scheme so filed as aforesaid may be confirmed by the Order of this Honourable Court.

And your Petitioners will ever pray, &c.

No. 3. *Advertisement of Petition to confirm a Scheme.* 1868

[*See Rule* 17.]

In the Matter of the Railway Company; and In the Matter of "The Railway Companies Act, 1867."

Notice is hereby given that a Petition was, on the day of , 18 , presented to the Lord Chancellor [*or* the Master of the Rolls] by the Directors of the above-named Company, praying the confirmation of a Scheme of Arrangement between the said Company and their Creditors, filed in the Court of Chancery on the day of . And that the said Petition is directed to be heard before the Vice-Chancellor Sir [*or* before the Master of the Rolls] on the day of , 18 , and any person whose interests are affected by such Scheme, and who may be desirous to oppose the making of an Order for the confirmation thereof under the above Act, should enter an appearance at the Office of the Clerks of Records and Writs on or before the day of , 18 , and appear by himself or Counsel at the hearing of the said Petition. And a copy of the Scheme and Petition will be furnished to any person requiring the same by the undersigned, or at the Office of the Company at , on payment of the regulated charge for the same.

A. and *B.*, of [Agents for *C.* and *D.*, of], Solicitors for the Petitioners.

CHELMSFORD, C.
ROMILLY, M.R.
CAIRNS, L.J.
JOHN STUART, V.C.
W. P. WOOD, V.C.
RICHARD MALINS, V.C.

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ORDER OF COURT.

Tuesday, the 25th day of February, 1868.

THE RIGHT HONOURABLE FREDERIC BARON CHELMSFORD, Lord High Chancellor of Great Britain, by and with the advice and assistance of The RIGHT HONOURABLE JOHN LORD ROMILLY, Master of the Rolls, The HONOURABLE the VICE-CHANCELLOR SIR JOHN STUART, The HONOURABLE the VICE-CHANCELLOR SIR WILLIAM PAGE WOOD, and The HONOURABLE the VICE-CHANCELLOR SIR RICHARD MALINS: Doth hereby, in pursuance and execution of all powers and authorities in that behalf, order and direct in manner following:—

Where, by any Decree or Order of the Court any interest or dividends accruing upon any stocks, funds, shares, or securities standing in the name of the Accountant-General in trust, in or to the credit of any cause, matter, or account, is or are directed to be dealt with in any such manner as that the same ought not to be invested, and subsequently to the date of such Decree or Order such interest, or dividends, or any part thereof, shall by reason of due notice of such Decree or Order not having been given to the Accountant-General, have been invested by him in the purchase of any stocks, funds, shares, or securities, the Registrar on production of the Accountant-General's certificate of such investment, shall issue a certificate for the sale of the stocks, funds, shares, or securities so purchased, and such stocks, funds, shares, or securities shall be sold accordingly, and the produce thereof applied in the same manner as the interest or dividends with which such stocks, funds, shares, or securities were purchased, was or were by such Decree or Order as aforesaid directed to be applied.

CHELMSFORD, C.
ROMILLY, M.R.
JOHN STUART, V.C.
W. P. WOOD, V.C.
RICHD. MALINS, V.C.

ORDER OF COURT.

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Saturday, the 21st day of March, 1868.

THE RIGHT HONOURABLE HUGH MACCALMONT BARON CAIRNS, Lord High Chancellor of Great Britain, with the advice and consent of The RIGHT HONOURABLE JOHN LORD ROMILLY, Master of the Rolls, The HONOURABLE the VICE-CHANCELLOR SIR JOHN STUART, and The HONOURABLE the VICE-CHANCELLOR SIR RICHARD MALINS, Doth hereby, in pursuance and execution of the powers given to him by "The Companies Act, 1867," and of all other powers and authorities enabling him in that behalf, Order and direct in manner following:—

PETITIONS FOR WINDING UP.

1. Every Petition which shall after this Order comes into operation be presented for the winding up of any Company by the Court, or subject to the supervision of the Court, and all notices, affidavits, and other proceedings under such Petition, shall be intituled in the matter of "The Companies Acts, 1862 and 1867," and of the Company to which such Petition shall relate.

PETITION TO REDUCE CAPITAL.

2. Every Petition for an Order confirming a special resolution for reducing the Capital of a Company, and all notices, affidavits, and other proceedings under such Petition, shall be intituled in the matter of "The Companies Act, 1867," and of the Company in question.

3. No such Petition as mentioned in the 2nd Rule of this Order shall be placed in the List of Petitions by the Secretary of the Lord Chancellor or of the Master of the Rolls, as the case may be, until after the expiration of eight clear days from the filing of such Certificate as is mentioned in the 14th Rule of this Order.

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4. When any such Petition as last aforesaid has been presented, application may be made, *ex parte* by Summons in Chambers, to the Judge to whose Court the Petition is attached, for directions as to the proceedings to be taken for settling the List of Creditors entitled to object to the proposed reduction, and the Judge may thereupon fix the date with reference to which the List of such creditors is to be made out, pursuant to the 13th section of the Companies Act, 1867; and may, either at the same time or afterwards, as he shall think fit, give such directions as are mentioned in the 5th and 6th Rules of this Order. The Order upon such Summons may be in the Form No. 1 in the Schedule hereto, with such variations as the circumstances of the case may require.

5. Notice of the presentation of the Petition shall be published at such times and in such newspapers as the Judge shall direct, so that the first insertion of such notice be made not less than one calendar month before the day of the date fixed as mentioned in the 4th Rule of this Order. Such notice may be in the Form No. 2 in the Schedule hereto, with such variations as the circumstances of the case may require.

6. The Company shall, within such time as the Judge shall direct, file in the Office of the Clerks of Records and Writs an Affidavit made by some officer or officers of the Company competent to make the same, verifying a List containing the names and addresses of the Creditors of the Company at the date fixed as mentioned in the 4th Rule of this Order, and the amounts due to them respectively, and leave the said list and an Office Copy of such Affidavit, at the Chambers of the Judge.

7. The person making such Affidavit shall state therein his belief that such List is correct, and that there was not at the date so fixed as aforesaid any debt or claim which, if that date were the commencement of the winding up of the Company, would be admissible in proof against the Company, except the debts set forth in such List, and shall state his means of knowledge of the matters deposed to in such Affidavit. Such affidavit may be in

containing the names and addresses of the creditors, and the sums due to them respectively, or (as the Judge shall think fit) complete copies of such list,

the Form No. 3 in the Schedule hereto, with such variations as the circumstances of the case may require. 1868

8. Copies of such List shall be kept at the Registered Office of the Company, and at the Offices of their Solicitors and London Agents (if any), and any person desirous of inspecting the same may at any time, during the ordinary hours of business, inspect and take extracts from the same on payment of the sum of one shilling. (Amended by Ord 2 March 1869 4 Ch xxxiii)

9. The Company shall, within seven days after the filing of such Affidavit, or such further time as the Judge may allow, send to each Creditor whose name is entered in the said List, a notice stating the amount of the proposed reduction of Capital, and the amount of the debt for which such Creditor is entered in the said List, and the time (such time to be fixed by the Judge) within which, if he claims to be a Creditor for a larger amount, he must send in his name and address, and the particulars of his debt or claim, and the name and address of his Solicitor (if any) to the Solicitor of the Company; and such notice shall be sent through the post in a pre-paid letter addressed to each Creditor at his last known address or place of abode, and may be in the Form or to the effect of the Form No. 4, set forth in the Schedule hereto, with such variations as the circumstances of the case may require.

10. Notice of the List of Creditors shall, after the filing of the Affidavit mentioned in the 6th of these Rules, be published at such times, and in such newspapers, as the Judge shall direct. Every such notice shall state the amount of the proposed reduction of Capital, and the places where the aforesaid List of Creditors may be inspected, and the time within which Creditors of the Company who are not entered on the said List, and are desirous of being entered therein, must send in their names and addresses, and the particulars of their debts or claims, and the names and addresses of their Solicitors (if any) to the Solicitor of the Company; and such notice may be in the Form No. 5, set forth in the said Schedule hereto, with such variations as the circumstances of the case may require.

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11. The Company shall, within such time as the Judge shall direct, file in the Office of the Clerks of Records and Writs an Affidavit made by the person to whom the particulars of debts or claims are by such notices as are mentioned in the 9th and 10th Rules of this Order, required to be sent in, stating the result of such notices respectively, and verifying a List containing the names and addresses of the persons (if any), who shall have sent in the particulars of their debts or claims in pursuance of such notices respectively, and the amounts of such debts or claims, and some competent officer or officers of the Company shall join in such Affidavit, and shall in such List distinguish which (if any) of such debts and claims are wholly, or as to any and what part thereof, admitted by the Company, and which (if any) of such debts and claims are wholly, or as to any and what part thereof, disputed by the Company. Such Affidavit may be in the Form No. 6 in the Schedule hereto, with such variations as the circumstances of the case may require; and such List, and an Office Copy of such Affidavit, shall, within such time as the Judge shall direct, be left at the Chambers of the Judge.

12. If any debt or claim, the particulars of which are so sent in, shall not be admitted by the Company at its full amount, then, and in every such case, unless the Company are willing to set apart and appropriate in such manner as the Judge shall direct the full amount of such debt or claim, the Company shall, if the Judge think fit so to direct, send to the creditor a notice that he is required to come in and prove such debt or claim, or such part thereof as is not admitted by the Company, by a day to be therein named, being not less than four clear days after such notice, and being the time appointed by the Judge for adjudicating upon such debts and claims, and such notice shall be sent in the manner mentioned in the 9th Rule of this Order, and may be in the Form No. 7, in the Schedule hereto, with such variations as the circumstances of the case may require.

13. Such creditors as come in to prove their debts or claims in pursuance of any such notice as is mentioned in the 12th of these Rules, shall be allowed their costs of proof against the Company,

and be answerable for costs, in the same manner as in the case of persons coming in to prove debts under a decree in a cause. 1868

14. The result of the settlement of the list of Creditors shall be stated in a certificate by the Chief Clerk, and such certificate shall state what debts or claims (if any) have been disallowed, and shall distinguish the debts or claims the full amount of which the Company are willing to set apart and appropriate, and the debts or claims (if any) the amount of which has been fixed by inquiry and adjudication in manner provided by section 14 of the said Act, and the debts or claims (if any) the full amount of which is not admitted by the Company, nor such as the Company are willing to set apart and appropriate, and the amount of which has not been fixed by inquiry and adjudication as ~~last~~ aforesaid; and shall shew which of the Creditors have consented in writing to the proposed reduction, ~~and of what debts or claims~~ the payment ~~has~~ been secured ~~in manner provided by the said 14th section~~ as aforesaid (Amended by Order 2 March 1869 4 Ch XXXIV)

15. After the expiration of eight clear days from the filing of such last mentioned Certificate, the Petition may be placed in the List of Petitions upon a note from the Chief Clerk to the Secretary of the Lord Chancellor or of the Master of the Rolls, as the case may be, stating that the Certificate has been filed and become binding.

16. Before the hearing of the Petition, notices stating the day on which the same is appointed to be heard shall be published at such times and in such newspapers as the Judge shall direct. Such notices may be in the Form No. 8, in the Schedule hereto, with such variations as the circumstances of the case may require.

17. Any Creditor settled on the said list whose debt or claim has not, before the hearing of the Petition, been discharged or determined, or been secured in manner provided by the 14th section of the said Act, and who has not, before the hearing, signed a consent to the proposed reduction of Capital, may, if he think

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fit, upon giving two clear days' notice to the Solicitor of the Company of his intention so to do, appear at the hearing of the Petition and oppose the application.

18. Where a Creditor who appears at the hearing under the last preceding rule, is a Creditor the full amount of whose debt or claim is not admitted by the Company, and the validity of such debt or claim has not been inquired into and adjudicated upon under section 14 of the said Act, the costs of and occasioned by his appearance shall be dealt with as to the Court shall seem just, but in all other cases a Creditor appearing under the last preceding rule shall be entitled to the costs of such appearance, unless the Court shall be of opinion that in the circumstances of the particular case his Costs ought not to be allowed.

19. When the Petition comes on to be heard, the Court may, if it shall so think fit, give such directions as may seem proper with reference to the securing in manner mentioned in section 14 of the said Act the payment of the debts or claims of any Creditors who do not consent to the proposed reduction; and the further hearing of the Petition may, if the Court shall think fit, be adjourned for the purpose of allowing any steps to be taken with reference to the securing in manner aforesaid the payment of such debts or claims.

20. Where the Court makes an Order confirming a reduction, such Order shall give directions in what manner, and in what newspapers, and at what times, notice of the Registration of the Order and of such Minute as mentioned in the 15th section of "The Companies Act, 1867," is to be published; and shall fix the date until which the words "and reduced" are to be deemed part of the name of the Company as mentioned in the 10th section of the same Act.

FEES.

21. Solicitors shall be entitled to charge and be allowed for duties performed under the "The Companies Act, 1867," the same

Fees as they shall for the time being be entitled to charge and be allowed for the like duties performed under "The Companies Act, 1862," unless the Court or Judge shall otherwise specially direct. 1868

22. The same Fees of Court shall be paid in relation to proceedings in Chancery under "The Companies Act, 1867," as shall for the time being be payable in relation to like proceedings in Chancery under "The Companies Act, 1862," and shall be collected by Stamps in manner provided by the General Orders of the Court.

GENERAL DIRECTIONS.

23. The General Orders and practice of the Court, including the course of proceeding and practice in the Judges' Chambers, shall, in cases not provided for by "The Companies Act, 1867," or these Rules, so far as such Orders and practice are applicable and not inconsistent with the said Act or with these Rules, apply to all proceedings in the Court of Chancery under the said Act.

24. The power of the Court and of the Judge sitting in Chambers to enlarge or abridge the time for doing any act or taking any proceeding, to adjourn or review any proceeding, and to give any direction as to the course of proceeding, shall be the same in proceedings under "The Companies Act, 1867," as in proceedings under the ordinary jurisdiction of the Court.

COMMENCEMENT OF ORDER.

25. This Order shall take effect and come into operation on the 15th day of April, 1868, and shall apply to all proceedings in Chancery under the said Act, whether commenced before or after that day, but every proceeding taken under the said Act before that day shall have the same validity as it would have had if this Order had not been made.

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INTERPRETATION.

26. The general interpretation clause of the Consolidated General Orders shall be deemed to extend and apply to the Rules of this Order, and this Order shall be deemed a General Order of this Court.

CAIRNS, C.
ROMILLY, M.R.
JOHN STUART, V.C.
RICHARD MALINS, V.C.

THE SCHEDULE.

No. 1. *Form of Order.* [*Rule* 4].

The Master of the Rolls [*or* Vice-Chancellor Sir at Chambers].

In the Matter of The Company, Limited and Reduced; and in the Matter of "The Companies Act, 1867."

Upon the application of the Petitioners by Summons, dated , and upon hearing the Solicitor for the Petitioners, and on reading the Petition on the day of , preferred unto the Right Honourable the Lord High Chancellor of Great Britain [*or*, Master of the Rolls], it is ordered that an Inquiry be made what are the Debts, Claims, and Liabilities of or affecting the said Company on the day of , 186 , and that notice of the presentation of the said Petition be inserted in [the newspapers] on the day of and [other times of insertion], and that a list of the persons who are Creditors of the Company on the said day of , and an office copy of the Affidavit verifying the same, be left at the Chambers of the Judge on or before the day of .

No. 2. [*See Rule* 5]. 1868

In the Matter of The Company, Limited an Reduced; and in the Matter of "The Companies Act, 1867."

Notice is hereby given, that a Petition for confirming a resolution reducing the capital of the above Company from £ to £ , was on the day of presented to [the Lord Chancellor, *or* the Master of the Rolls], and is now pending; and that the list of creditors of the Company is to be made out as for the day of , 186 .

C. and *D.* of [Agents for *A.* and *B.*, of].
Solicitors to the Company.

No. 3. *Affidavit verifying List of Creditors.* [*Rule* 7.]

In Chancery.

In the Matter of The Company, Limited and Reduced; and in the Matter of "The Companies Act, 1867."

I, *A. B.*, of &c., make oath and say as follows:—

1. The paper writing now produced and shewn to me, and marked with the letter A., contains a List of the Creditors of and persons having claims upon the said Company on the day of , 186 (the date fixed by the Order in this matter, dated), together with their respective addresses, and the nature and amount of their respective Debts or Claims, and such List is, to the best of my knowledge, information, and belief, a true and accurate List of such Creditors and persons having claims on the day aforesaid.

2. To the best of my knowledge and belief there was not, at the date aforesaid, any Debt or Claim which, if such date were the commencement of the winding up of the said Company, would be admissible in proof against the said Company other than and except the Debts set forth in the said List. I am enabled to make this Statement from facts within my knowledge as the of the said Company, and from information derived upon investigation of the affairs and the books, documents, and papers of the said Company.

Sworn, &c.

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List of Creditors referred to in the last Form.

A.

In the Matter, &c.

This List of Creditors marked A. was produced and shewn to *A. B.*, and is the same List of Creditors as is referred to in his Affidavit sworn before me this day of , 186 .

X. Y., &c.

Names, Addresses, and Description of the Creditors.	Nature of Debt or Claim.	Amount of Debt or Claim.

No. 4. [*See Rule* 9.]

In the Matter of The Company, Limited and Reduced; and in the Matter of "The Companies Act, 1867."

To Mr. .

You are requested to take notice that a Petition has been presented to the Court of Chancery to confirm a Special Resolution of the above Company, for reducing its Capital to £ , and that in the list of persons admitted by the Company to have been on the day of , creditors of the Company, your name is entered as a creditor [*here state the amount of the debt or nature of the claim*].

If you claim to have been on the last-mentioned day a Creditor to a larger amount than is stated above, you must on or before the day of , send in the particulars of your claim, and the name and address of your Solicitor (if any), to the undersigned at . In default of your so doing, the above entry in the list of Creditors will in all the proceedings under the above application to reduce the Capital of the Company be treated as correct.

Dated this day of , 18 .

A. B.,
Solicitor for the said Company.

No. 5. [*See Rule* 10.]

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In the Matter of The Company, Limited and Reduced; and in the Matter of "The Companies Act, 1867."

Notice is hereby given, that a Petition has been presented to the Court of Chancery for confirming a Resolution of the above Company, for reducing its Capital from £ to £ . A list of the persons admitted to have been Creditors of the Company on the day of , 186 , may be inspected at the Offices of the Company at , or at the Office of , at any time during usual business hours, on payment of the charge of one shilling.

Any person who claims to have been on the last-mentioned day and still to be a Creditor of the Company, and who is not entered on the said List and claims to be so entered, must on or before the day of , send in his name and address, and the particulars of his claim, and the name and address of his Solicitor (if any), to the undersigned, at , or in default thereof he will be precluded from objecting to the proposed reduction of Capital.

Dated this day of , 18 .

A. B.,
Solicitor for the said Company.

No. 6. [*Rule* 11.]

In Chancery.

In the Matter of the Company, Limited and Reduced; and in the Matter of "The Companies Act, 1867."

We, *C. D.*, of &c. [the Secretary of the said Company], *E. F*, of &c,, [the Solicitor of the said Company], and *A. B.*, of &c. [the Managing Director of the said Company], severally make oath and say as follows:

I, the said *C. D.*, for myself, say as follows:—

1. I did, on the day of , 186 , in the manner hereinafter mentioned, serve a true copy of the Notice now produced and shewn to me, and marked B., upon each of the respective persons whose names, addresses, and descriptions appear in the first column of the List of Creditors marked A., referred to in the Affidavit of , filed on the day of , 186 . [Rule 9.]

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2. I served the said respective copies of the said Notice by putting such copies respectively, duly addressed to such persons respectively, according to their respective names and addresses appearing in the said List (being the last known addresses or places of abode of such persons respectively), and with the proper postage stamps affixed thereto as prepaid letters, into the Post Office, Receiving House, No. , in Street, in the County of , between the hours of and of the clock in the noon of the said day of .

And I, the said *E. F.*, for myself, say as follows:

If Notice issued under Rule 10.

3. A true copy of the Notice now produced and shewn to me, and marked C., has appeared in the of the day of , 186 , the of the day of , 186 , &c.

[Rule 11.]

4. I have, in the paper writing now produced and shewn to me, and marked D., set forth a List of all claims, the particulars of which have been sent in to me pursuant to the said Notice B. now produced and shewn to me by persons claiming to be Creditors of the said Company for larger amounts than are stated in the List of Creditors marked A., referred to in the Affidavit of , filed on the day of , 186 .

If Notice issued under Rule 10.

5. I have, in the paper writing now produced and shewn to me, marked E., set forth a List of all Claims the particulars of which have been sent in to me pursuant to the Notice referred to in the third paragraph of this Affidavit by persons claiming to be Creditors of the said Company on the day of , 186 , not appearing on the said List of Creditors, marked A., and who claimed to be entered thereon.

And we, *C. D*, and *A. B.*, for ourselves, say as follows:—

[Rule 11.]

6. We have in the first part of the said paper writing, marked D. (now produced and shewn to us), and also in the first part of the said paper writing, marked E. (also produced and shewn to us), respectively set forth such of the said Debts and Claims as are admitted by the said Company to be due wholly or in part, and how much is admitted to be due in respect of such of the same Debts and Claims respectively as are not wholly admitted.

[Rule 11.]

7. We have, in the second part of each of the said paper writings, marked D. and E., set forth such of the said Debts and Claims as are wholly disputed by the said Company.

8. In the said Exhibits D. and E. are distinguished such of the Debts, the full amounts whereof are proposed to be set apart and appropriated in such manner as the Judge shall direct.

Sworn, &c.

Exhibit D., referred to in the last-mentioned Affidavit. 1868

D.

In the Matter, &c.

List of Debts and Claims of which the particulars have been sent in to . by persons claiming to be Creditors of the said Company for *larger amounts* than are stated in List of Creditors made out by the Company.

This paper writing marked D., was produced and shewn to *C. D.*, *E. F.*, and *A. B.*, respectively, and is the same as is referred to in their Affidavit sworn before me this . day of 186 .

X. Y. &c.

FIRST PART.

Debts and Claims wholly or partly admitted by the Company.

Names, Addresses, and Descriptions of Creditors.	Particulars of Debt or Claim.	Amount claimed.	Amount admitted by the Company to be owing to Creditor.	Debts proposed to be set apart and appropriated in full, although disputed.

SECOND PART.

Debts and Claims wholly disputed by the Company.

Names, Addresses, and Descriptions of Claimants.	Particulars of Claim.	Amount claimed.	Debts proposed to be set apart and appropriated in full, although disputed.

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Exhibit E., referred to in the last Affidavit.

E.

In the Matter, &c.

List of Debts and Claims of which the particulars have been sent in to Mr. by persons claiming to be Creditors of the Company, and to be entered on the List of the Creditors made out by the Company.

This paper writing, marked E., was produced and shewn to *C. D.*, *E. F.*, and *A. B.*, respectively, and is the same as is referred to in their Affidavit, sworn before me, this day of , 186 .

X. Y., &c.

First Part.

[Same as in Exhibit D.]

Second Part.

[Same as in Exhibit D.]

Note.—The names are to be inserted alphabetically.

No. 7. [*See Rule* 12.]

In the Matter of The Company, Limited and Reduced; and in the Matter of "The Companies Act, 1867."

To Mr.

You are hereby required to come in and prove the debt claimed by you against the above Company, by filing your affidavit and giving notice thereof to Mr. , the Solicitor of the Company, on or before the day of next; and you are to attend by your Solicitor at the Chambers of [the Master of the Rolls, in the Rolls Yard, Chancery Lane, *or* the Vice-Chancellor at No. , Lincoln's Inn], in the County of Middlesex, on the day of , 18 , at o'clock in the noon, being the time appointed for hearing and adjudicating upon the claim, and produce any securities or documents relating to your claim.

In default of your complying with the above directions, you will [be

precluded from objecting to the proposed reduction of the Capital of the Company], *or* [in all proceedings relative to the proposed reduction of the Capital of the Company be treated as a Creditor for such amount only as is set against your name in the List of Creditors]. 1868

Dated this day of , 18 .

A. B.,
Solicitor for the said Company.

No. 8. [*See Rule* 16.]

In the Matter of The Company, Limited and Reduced; and in the Matter of "The Companies Act, 1867."

Notice is hereby given, that a Petition presented to the [Lord Chancellor] *or* [the Master of the Rolls], on the day of , for confirming a Resolution reducing the Capital of the above Company from £ to £ , is directed to be heard before [the Vice-Chancellor] *or* [the Master of the Rolls], on the day of , 186 .

C. and *D.* of [Agents for *E.* and *F.* of].
Solicitors for the Company.

CAIRNS, C.
ROMILLY, M.R.
JOHN STUART, V.C.
RICHARD MALINS, V.C.

1868

REGULATION

AS TO THE MODE OF REMUNERATING

OFFICIAL LIQUIDATORS

ADOPTED BY

THE MASTER OF THE ROLLS AND THE VICE-CHANCELLORS,

AND SANCTIONED AND APPROVED BY THE

LORD CHANCELLOR.

Every application by an Official Liquidator for remuneration must be supported by an affidavit shewing the number of hours devoted by him and his clerks respectively to the business of the liquidation.

In fixing the amount of the remuneration, the Judge will, subject as hereinafter mentioned, be guided by the following scale:—

LIQUIDATORS.

						Per Day of Eight Hours.
					£	£
Group A.	CLASS 1.	Where the Assets divisible among the unsecured Creditors shall not amount to			500	1
	„ 2.	Where they shall amount to	£ 500	and not to	2,000	2
	„ 3.	„	2,000	„	5,000	3
Group B.	„ 4.	„	5,000	„	10,000	4
	„ 5.	„	10,000	„	50,000	6
Group C.	„ 6.	„	50,000	„	100,000	8
	„ 7.	„	100,000	„	500,000	10
	„ 8.	„	500,000 and over			12

CLERKS.

	1st Class.	2nd Class.	3rd Class.
GROUP A.	2*s.* ..	1*s.* 6*d.* ..	1*s.* per hour.
„ B.	3*s.* ..	2*s.* 6*d.* ..	1*s.* „
„ C.	3*s.* 6*d.* ..	2*s.* 6*d.* ..	1*s.* „

If in the special circumstances of any liquidation it shall at any time, or from time to time, appear to the Judge that it is proper

See Re Agra & Masterman's Bank, Cannan's Claim
L.R. 7 Eq 102.

to place it on a higher or lower class, he will so place it accordingly. 1868

If it shall appear to the Judge that in the special circumstances of any liquidation it is proper to add to or deduct from the amount of remuneration provided by the scale, he will make such addition or deduction accordingly.

If during the progress of a liquidation it shall appear to the Judge expedient so to do, he will sanction payments to the Liquidator on account of his remuneration.

For this purpose the Judge will estimate the amount of such remuneration as well as circumstances will admit, and will pay to the Liquidator either the whole of such estimated remuneration or such part thereof as to the Judge shall seem reasonable.

1868

GENERAL ORDERS,

MADE PURSUANT TO

THE BANKRUPTCY AMENDMENT ACT, 1868,

31 & 32 Vict. c. 104.

The 12th day of October, 1868.

It is Ordered as follows: that is to say,

From and after the date of these Orders the General Order bearing date the twenty-second day of May one thousand eight hundred and sixty-two, relating to deeds left for registration, and the General Order bearing date the twenty-third day of July one thousand eight hundred and sixty-two, shall be and the same are hereby rescinded; and in lieu thereof it is ordered as follows:

1. Together with every deed or instrument left on or after the twelfth day of October one thousand eight hundred and sixty-eight at the office of the Chief Registrar, for the purpose of being registered under Section 192 of the Bankruptcy Act, 1861, and in addition to the affidavit or certificate required to be delivered to the Chief Registrar under the fifth condition of the said Section, there shall be delivered to the Chief Registrar a copy of such deed or instrument, certified to be a true copy by the attorney or solicitor attesting the execution of the same by the debtor, or by some other attorney or solicitor acting on behalf of the party requiring such registration, and also, and as nearly as may be in the forms set out in that behalf respectively in the Schedules A. 1, A. 2, and B. to these Orders annexed, a list of the debts and liabilities of the debtor, and a statement shewing the debtor's

property and credits, and the estimated value thereof, as required by the Bankruptcy Amendment Act, 1868, and in cases of partnership there shall be separate lists and statements of the debts and liabilities, property and credits, of the partnership and of each partner. 1868

2. The said list and statement shall be accompanied by an affidavit made by the debtor or some other person able to depose thereto, verifying the same, which affidavit shall be as nearly as may be in the form set out in Schedule C. to these Orders annexed.

3. Every Order for leave to add to or amend the said list or statement, together with the addition or amendment made in pursuance of such Order, and an affidavit made by the debtor, or some other person able to depose thereto, verifying such addition or amendment, and stating the reason why such addition or amendment has been rendered necessary, and why the substance thereof was not contained in the original list or statement, shall be delivered to the Chief Registrar within four days from the date of such Order, or such further time as the Court shall direct, and every such addition or amendment shall shew the date of the Order allowing the same, and by what Court the Order was made, and the said affidavit shall be as nearly as may be in the form set out in Schedule D. to these Orders annexed.

4. The notice required by the 2nd Section of the Bankruptcy Amendment Act, 1868, to be given of the leaving of such list or statement, and of any amendments or additions thereto, shall be published, by the party requiring the registration, in the London Gazette within four days, and in one or more daily papers circulating in the neighbourhood in which the debtor resides or carries on his business, within seven days after such list or statement, amendment or addition, shall have been left with the Chief Registrar.

5. Any assenting creditor of a debtor executing a deed of arrangement under Section 192 of the Bankruptcy Act, 1861, may

1868 prove his debt by affidavit or declaration in the forms set out in Schedules E. and F. respectively to these Orders annexed, and every such affidavit or declaration shall be left with the Chief Registrar, together with the written assent or approval of every such creditor, at the same time as the copy deed or instrument directed to be left as aforesaid, or at such other time as the Court by Order may allow, and shall be filed forthwith.

6. Any assenting creditor of a debtor executing a deed of arrangement under Section 192 of the Bankruptcy Act, 1861, may prove his debt by the affidavit, or declaration, of a clerk or other person in his employment, and all bodies politic and public companies incorporated, or authorized to sue or bring actions, may prove by the affidavit or declaration of an agent; provided that every such clerk, person, or agent, shall in his affidavit or declaration state, that he is duly authorized by the creditor or company to prove the debt, and that it is within his own knowledge that the debt was contracted, and for the consideration in the affidavit or declaration stated, and that to the best of his knowledge and belief the debt still remains unpaid and unsatisfied; and the said affidavit or declaration may be in the forms set out in Schedules G. and H. to these Orders annexed, or as near thereto as may be.

7. Any person, stating himself in writing to be a creditor of the debtor, may personally, or by attorney or agent, inspect the said copy deed and the said list or statement, and every addition or amendment thereto, and the said affidavits or declarations of debt and assents by the creditors, upon application at the office of the Chief Registrar, in the form set out in Schedule J. to these Orders annexed, and upon payment to the Chief Registrar, by bankruptcy stamp, of the fee of one shilling for each such application, and may have an office copy of or extract from every such copy deed, list, statement, addition, amendment, affidavit, or declaration, and assent, upon paying for the same at the like rate as for office copies of proceedings in Bankruptcy.

8. A creditor applying for a summons under Section 5 of the Bankruptcy Amendment Act, 1868, shall prove his debt by affi-

davit or declaration, in the forms set out in Schedules E. and F. respectively to these Orders annexed, and such proof of debt, together with a written statement of the grounds upon which such application is made, shall be filed with the proceedings. 1868

9. In cases where the production of a registered deed, or certified copy thereof, or of any proceedings thereunder, is required for the purpose of any sitting to be held, or application to be made, under such deed, the person requiring such production shall give two clear days' notice in writing to the Chief Registrar at the office in Quality Court, Chancery Lane, stating the day and hour appointed for such sitting or application, and the Court or Officer before whom it is to be held or made, and specifying the documents the production of which is required; and such Court shall have the custody of the documents produced until the sitting or application is concluded, whereupon the same shall be transmitted, together with any examinations taken, or affidavits used at such sitting or application, to the said office in Quality Court, where the same shall be forthwith filed.

10. The memorandum of registration required by the Bankruptcy Act, 1861, to be written on the face of every deed, on being registered, shall, in addition to the statement of the day and hour at which the same was brought into the office for registration, specify under what Section of the same Act such deed was registered; and such memorandum, together with the other forms given in the nineteenth of the General Orders made under the Bankruptcy Act, 1861, shall be intituled under the Bankruptcy Amendment Act, 1868, as well as the Bankruptcy Act, 1861.

11. A copy of the memorandum of registration written on the face of every deed or instrument shall be made on the face of the copy of the deed or instrument delivered to the Chief Registrar.

12. A creditor of a debtor executing a deed of arrangement under Section 187 of the Bankruptcy Amendment Act, 1861, may prove his debt by affidavit or declaration in the Forms set out in Schedules E. and F. respectively to these Orders annexed, and the

1868 authorized clerk, servant, or agent of a creditor or company may prove the debt of such creditor or company in the Forms set out in Schedules G. and H. to these Orders annexed, or as near as may be, and such affidavit or declaration shall be filed with the proceedings four days before the Court by Order makes a declaration of the complete execution of such deed.

CAIRNS, C.
EDW^{D} HOLROYD, Senior Commissioner.
THO^{S} EWING WINSLOW.
JAMES BACON.

SCHEDULES to the foregoing Orders.

SCHEDULE A (1.)

THE BANKRUPTCY AMENDMENT ACT, 1868.

Form of the List to be delivered to the Chief Registrar, pursuant to Section 1 of the Act.

A LIST shewing the Debts and Liabilities of [*here insert Name, Description, and Residence of Debtor*], amounting to Ten Pounds and upwards, and the Times when such Debts and Liabilities were contracted or incurred, and the Considerations for the same; and the Names, Residences, and Occupations of his [*or "their"*] Creditors, and the respective Amounts due to them; and the Securities held by them, and the estimated Value of such Securities.

No.	Names, Residences, and Occupations of the Creditors.	If Assenting.	Secured.		Unsecured.	Nature of Security, and Date when given.	Time when the Debt or Liability was contracted.	Consideration for the Debt or Nature of Liability.
			Amount.	Value or estimated Value of the Security to be deducted.	Amount.			
			£ s. d.	£ s. d.	£ s. d.			
1	*Anderson, John*, 5, *Fore Street, London*, brush-maker.	Assenting.	1,200 0 0	450 0 0	750 0 0	Mortgage dated 1st July, 1868, of Two Freehold Houses at *Hendon*, for securing £600. The estimated value of the security is £450.	1st April, 1868	Money lent.
2	*Hopkinson, Joseph*, 65, *Cornhill, London*, jeweller.	..	..	..	360 0 0	.. .. ..	Between 4th June, 1864, and 6th October, 1868.	Goods sold.
3	*Watson, Henry*, 45, *Strand, London*, grocer.	Assenting.	..	..	200 0 0	.. .. ..	12th August, 1867.	Indorsement of Bill of Exchange.

No. of Creditors .. 36

Assenting .. 20
Not assenting .. 16

36

Amount of debts* .. £24,000

$\frac{1}{4}$ 6,000

3

$\frac{3}{4}$ths £18,000

Amount of debts* of creditors assenting .. £21,300

$\frac{3}{4}$ths required 18,000

£ 3,300

* Computing only the amount due after deducting the value of securities held on the Debtor's property.

SCHEDULE A. (2.)

A List shewing the Debts and Liabilities of the above-named [Debtor] under Ten Pounds, and the Times when such Debts and Liabilities were contracted or incurred, and the Considerations for the same; and the Names, Residences, and Occupations of his Creditors, and the respective Amounts due to them, and the Securities held by them, and the estimated Value of such Securities.

No.	Names, Residences, and Occupations of the Creditors.	Secured.		Unsecured.	Nature of Security, and Date when given.	Time when Debt or Liability contracted.	Consideration for the Debt or Nature of Liability.
		Amount.	Value or estimated Value of the Security to be deducted.	Amount.			
		£ s. d.	£ s. d.	£ s. d.			
1	*Smith, James*, 200, *London Wall*, tailor.	..	..	9 17 6	.. .. ..	4th June, 1868 ..	Goods sold.
2	*Robinson, Henry*, 1, *Lime Street, Gravesend*, baker.	..	..	5 0 0	.. .. ..	10th July, 1860 ..	Money lent.
3	*Jones, Samuel*, 150, *Chancery Lane*, law writer.	..	..	6 6 0	.. .. ..	Between 25th March, and 25th April, 1868.	Work done.

Number of Creditors .. .. .. 22 Amount of Debts £112 18 6

SCHEDULE B.

1868

THE BANKRUPTCY AMENDMENT ACT, 1868.

Form of the Statement to be delivered to the Chief Registrar, pursuant to Section 1 *of the Act.*

STATEMENT of Property and Credits of (*A. B.*) of on the day of 186 , being the date of the execution by him of a Deed of Arrangement for the benefit of his Creditors.

	Charges and Incumbrances. £ *s.* *d.*	Estimated Value, less Amount of Charges and Incumbrances. £ *s.* *d.*
Freehold, copyhold, and leasehold property, with local description, names of tenants, and annual rent of the same . . .		
Reversionary or expectant interests in real estate		
Cash, bills of exchange, promissory notes, or securities of any description . . .		
Book debts		
Household goods, furniture, and household effects		
Stock in trade		
Income arising from salaries, fees, annuities, pensions, or other emoluments . .		
Policies of insurance on the life of the above-named (*A. B.*) or in which he has any interest		
Personal property of any other description, in possession		
Reversionary or expectant interests in personal estate of any description . .		

SCHEDULE C.

THE BANKRUPTCY AMENDMENT ACT, 1868.

Affidavit verifying List and Statement, under Section 1.

I *A. B.*, of , make oath and say as follows:—

I have read the list and statement now produced to me, and marked [M] and [N] respectively, and I say that the said list contains to the

1868 best of my knowledge, information, and belief, a full, true, and accurate account of my debts and liabilities of every kind [*or, if made by any other person,* "of the debts and liabilities of," *here insert name and description of the debtor*], and the times when such debts and liabilities were contracted or incurred, and the considerations for the same, the names, residences, and occupations of my [*or* "his"] creditors, and the respective amounts due to them, and the securities held by them, and the estimated value of such securities, as required by the Bankruptcy Amendment Act, 1868, and that the said statement contains, to the best of my knowledge, information, and belief, a full, true, and accurate account of all my property and credits [*or, if made by any other person,* "of the property and credits of the above-named [*debtor*]," and the estimated value thereof, as required by the Bankruptcy Amendment Act, 1868.

Sworn, &c.

Before me.

NOTE.—*If the affidavit is made by any person other than the debtor, add,* "And I am able to make this deposition because" [*stating the circumstances under which the deponent has become acquainted with the affairs of the debtor.*]

SCHEDULE D.

THE BANKRUPTCY AMENDMENT ACT, 1868.

Form of Affidavit verifying Addition to or Amendment of the List or Statement under Section 1.

I *A. B.*, of , make oath and say as follows:—

I have read the paper-writing now produced to me, and marked [C], and I say that the said paper-writing, together with the list marked [M] referred to in my former affidavit sworn in reference to this matter on the day of , contains, to the best of my knowledge, information, and belief, a full, true, and accurate account of my debts and liabilities of every kind [*or, if made by any other person,* "of the debts and liabilities of" *the debtor*], and the times when such debts and liabilities were contracted or incurred, and the considerations for the same; the names, residences, and occupations of my [*or* his] creditors, and the respective amounts due to them, and the securities held by them, and the estimated value of such securities, as required by the Bankruptcy Amendment Act, 1868; and I say that the reason why the addition [*or* amendment] contained in the said paper-writing marked [C] was rendered necessary, and why the substance thereof

was not contained in the said list marked [M], was [*here state the reason to the best of the deponent's knowledge and belief.*] 1868

Sworn, &c.

Before me

NOTE 1.—*If the affidavit be made by any person other than the debtor, add,* "And I am able to make this deposition because" [*state the circumstances under which the deponent has become acquainted with the affairs of the debtor*].

NOTE 2.—*If the "statement" be added to or amended, the affidavit of verification may be in the above form, with the necessary alterations.*

SCHEDULE E.

THE BANKRUPTCY AMENDMENT ACT, 1868.

Form of Affidavit by Creditor under a Deed.

In the Matter of a Deed of Arrangement between *A. B.* of [*insert here name and description of debtor*] and his Creditors.

I *C. D.*, of , in the county of [*add description of creditor*], make oath and say, that the above-mentioned *A. B.* [*naming the debtor*] is justly and truly indebted to me in the sum of £ for [*state consideration of the debt and time when contracted, as* "for goods sold, delivered by me to the said *A. B.* between the day of , 18 , and the day of , 18 ," *or as the case may be*], and that I have not, nor hath any other person on my behalf or for my use, had or received any manner of satisfaction or security whatever for the said sum of £ or any part thereof [*if the creditor holds any securities add,* "save and except," *specifying the securities, as* "a Bill of Sale bearing date the day of , 18 ," *or as as the fact may be*].

Sworn, &c.

Before me

SCHEDULE F.

THE BANKRUPTCY AMENDMENT ACT, 1868.

Form of Declaration of Proof of Debt by Creditor under a Deed.

In the Matter of a Deed of Arrangement between *A. B.* of and his Creditors.

I *C. D.*, , of [*here insert description of creditor*], do solemnly declare, that the statement of the debt and of the account [*if any*]

1868

between me and the above-named *A. B.* , hereunto annexed, is a full, true, and complete statement of account between me and the said *A. B.* , and that the debt amounting to £ thereby appearing to be due from the said *A. B.* to me was contracted on the day of [*or* between the day of , 18 , and the day of , 18 ,] and still is justly due and owing, and that I have not, nor hath any person on my behalf or for my use, received any satisfaction or security whatsoever for the said debt or any part thereof, save and except [*as in an affidavit of debt*].

Declared, &c.

Before me

SCHEDULE G.

THE BANKRUPTCY AMENDMENT ACT, 1868.

Form of Affidavit by Clerk or Servant or Agent of Creditor under a Deed.

In the Matter of a Deed of Arrangement between *A. B.* of [*here insert name and description of debtor*] and his Creditors.

I *C. D.*, , of [*here insert name and description of deponent*], make oath and say, that I am the clerk of [*or* "employed in the capacity of by"] *E. F.* of [*or if a company or other public body be the creditor* "that I am the agent of" (*describing the body or company*)] and that the above-mentioned *A. B.* [*naming the debtor*] is justly and truly indebted to the said *E. F.* [*or* "to the said company" (*describing it*)] in the sum of £ for [*state consideration of the debt*], and that to the best of my knowledge and belief the said [creditor *or* company] has not, nor has any other person on his [*or* their] behalf, or for his [*or* their] use, had or received any manner of satisfaction or security whatever for the said sum of £ , or any part thereof [*if the creditor holds any securities add*, "save and except," *&c., as in Schedule E.*]; and I further say that I am duly authorized by the said [creditor *or* company] to prove the said debt, and that it is within my own knowledge that the said debt was contracted, and for the consideration in this my affidavit stated, and that to the best of my knowledge and belief the same debt still remains unpaid and unsatisfied.

Sworn, &c.

Before me

SCHEDULE H.

1868

THE BANKRUPTCY AMENDMENT ACT, 1868.

Form of Declaration of Proof of Debt by Clerk, or Servant, or Agent of Creditor under a Deed.

In the Matter of a Deed of Arrangement between *A. B.* of [*here insert name and description of debtor*] and his Creditors.

I *C. D.*, , of [*here insert name and description of deponent*] do solemnly declare that I am the clerk of [*or*, "employed in the capacity of by,"] *E. F.* of [*or if a company or other public body be the creditor* "that I am the agent of" (*describing the company or body*)], and that the statement of the debt [*and* "of the account" (*if any*)] between the said *E. F.* [*or the said company or public body, describing it*] and the above-named *A. B.*, hereunto annexed, is a full, true, and complete statement of account between the said [creditor *or* company] and the said *A. B.*, and that the debt amounting to £ thereby appearing to be due from the said *A. B.* to the said [creditor *or* company] was contracted on the day of [*or* between the day of and the day of], and still is justly due and owing, and that to the best of my knowledge and belief the said [creditor *or* company] has not, nor has any other person on his [*or* their] behalf or for his [*or* their] use had or received any manner of satisfaction or security whatever for the said sum of £ or any part thereof [*if the creditor hold any securities, add* "save and except," *&c., as in Schedule E.*]; and I further say that I am duly authorized by the said [creditor *or* company] to prove the said debt, and that it is within my own knowledge that the said debt was contracted, and for the consideration in this my declaration stated, and that to the best of my knowledge and belief the same debt still remains unpaid and unsatisfied.

Declared, &c.

Before me

1868

SCHEDULE J.

THE BANKRUPTCY AMENDMENT ACT, 1868.

Form of Application by or on behalf of Creditor to inspect or take Copies.

In the Matter of a Deed of Arrangement between *A. B.* of [*insert name and description of debtor*] and his Creditors.

Sir,—I being a creditor [*or "the Attorney" or "Agent" of C. D. being a creditor*] of the above-named *A. B.*, desire to inspect the copy deed and proceedings in this matter, and require an office copy of [*specifying the documents required*] to be made for me.

I am, Sir,
Your obedient, &c.

Signature of applicant.

Address of applicant.

To the Chief Registrar.

Cairns, C.
Edw^d^ Holroyd, Senior Commissioner.
Tho^s^ Ewing Winslow.
James Bacon.

Chancery Appeal Cases

(Including Bankruptcy and Lunacy Cases)

BEFORE

THE LORD CHANCELLOR

AND THE

COURT OF APPEAL IN CHANCERY.

PEARSE *v.* DOBINSON.

L. C.
1867
Nov. 4, 5, 16.

Plea of Decree not enrolled—Plea standing for an Answer—Liberty to except.

Where a bill is filed to impeach a decree for fraud, whether a plea of such decree, with averments negativing the fraud, and an answer denying the fraud, is a good plea in bar of the suit, though the decree has not been enrolled, *quære.*

A plea to a bill impeaching a decree for fraud, and asking accounts, being ordered to stand for an answer, with liberty to except, the right of excepting was limited so as to preclude the Plaintiff from calling on the Defendants to set out accounts which could not be evidence in support of the charge of fraud.

Order of *Kindersley*, V.C., affirmed.

THIS was an appeal by the Plaintiff from an order of Vice-Chancellor *Kindersley*, directing a plea to stand for an answer, with liberty to except, but so that the Plaintiff should not require the Defendant to set out any of the accounts of the mortgagees or consignees in relation to the estates in question in the cause, or in relation to any charges on the estates.

The Plaintiff instituted the suit as the legal representative of his deceased wife, *Mary*, who had formerly been the wife of *James Craggs Parker*, one of the four sons by the first marriage of *Thomas John Parker*, who was the owner of certain estates in

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the island of *Jamaica*, called *Hillside*, *Biazaletto*, and *Chesterfield*.

Thomas John Parker, being about to marry a second time, and being desirous of making a provision for the children of his former marriage, by his marriage settlement, dated the 22nd of June, 1796, created a term of 500 years in his *Jamaica* estates, in trust to raise a sum of £40,000, to be paid equally to *Henry Parker*, *John Stevens Parker*, *George Mackenzie Parker*, and *James Craggs Parker*, at their ages of twenty-one years, with interest at 5 per cent. per annum, to commence from the death of *Thomas John Parker*. Subject to this term, *T. J. Parker* charged the estates with a jointure rent-charge for his intended wife, *Eliza Peters Washington Palmer*.

By a voluntary settlement, dated the 25th of October, 1808, *Thomas John Parker* charged the *Chesterfield* estate with £40,000 for his then four children by his second marriage. He had, in the year 1800, mortgaged his estates to *France & Co.* to secure a sum of £47,869 10*s.*, and in 1809, in consideration of *Peat, Litt, & Co.*, paying *France & Co.* all moneys owing by him to them, and taking their securities, he agreed to consign the produce of the estates to *France & Co.*, with directions as to the application of the net produce of the consignments. In December, 1810, *Peat, Litt, & Co.*, assigned to *Joseph Timperon* their interest in the mortgage, and he, together with the Defendant *Dobinson*, his partner, became the consignees of the produce of the estates. A question was raised, whether *Dobinson* had not a beneficial interest in the mortgage to *Timperon*, but the Court considered the fact not material.

All the sons of *Thomas John Parker* by his first wife attained twenty-one, and each became entitled to one-fourth of the £40,000 provided for them by the marriage settlement of the 22nd of June, 1796. *Henry Parker*, besides his original share, acquired the share of his brother, *John Stevens Parker*, as legatee under his will, and the share of his brother *James Craggs Parker*, by purchase from him. This latter share *Henry Parker* assigned to *Timperon* to secure £1505 12*s.* 10*d.* The other brother, *George Mackenzie Parker*, assigned one moiety of his share to *Edward Bullock*, and gave the other moiety by will to his son *Thomas*

Parker. *Henry Parker*, by his will, dated the 6th of August, 1826 (amongst other things), gave an annuity of £150 to the widow of *James Craggs Parker*, who, in the year 1834, became the wife of the Plaintiff *Pearse*. Mrs. *Pearse* had four children by her former husband, *James Craggs Parker*.

About May, 1835, the Plaintiff *Pearse* filed a bill, *Pearse* v. *Brooke*, on behalf of himself in right of his wife in respect of her annuity of £150 under the will of *Henry Parker*, and also on behalf of her four infant children, and of *Thomas Parker*, the infant son of *George Mackenzie Parker*, for the administration of the estate of *Henry Parker*. The bill prayed for proper directions for ascertaining the respective priorities of the charges and incumbrances affecting the *Jamaica* estates, and for accounts of the consignments, produce, and profits of the said estates possessed or received by the Defendants, and that the Defendant *Timperon* might give credit for the amount so received, and set off the same against what had accrued due to him for principal and interest on his securities, and that the amounts remaining upon the several charges and incumbrances directed to be raised might be paid according to their priorities. All parties entitled were before the Court in this suit of *Pearse* v. *Brooke*. The case was pending for several years, partly (it was alleged) from the voluminous nature of the accounts, and partly from the complicated interests which were involved in the inquiry.

Under the Act for the emancipation of the slaves in the *West Indies*, a sum of £24,956 9*s*. 6*d*. was awarded as compensation to the owner of the estates formerly belonging to *Thomas John Parker*, and this sum was paid into Court in the cause of *Pearse* v. *Brooke*. In this state of things the parties (with the alleged exception of the Plaintiff and his wife) agreed to a compromise of their several claims, and on the 24th of May, 1849, the Vice-Chancellor of *England* made an order (appearing on the face of it to be by consent of all parties) which directed that the compromise entered into should be carried into execution, and the fund distributed in certain proportions amongst the different claimants. Mrs. *Pearse*, the Plaintiff's wife, by her father as her next friend, appealed against this order, but it appearing on the face of it to have been made with the consent of all parties, it could not be the

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subject of appeal. The Lord Chancellor (Lord *Cottenham*), however, was stated to have expressed an opinion that the rights of Mrs. *Pearse* had not been sufficiently regarded, and that the case ought to go back to the Vice-Chancellor of *England*.

Thus matters stood until the year 1852, when an arrangement was made substantially upon the footing of the compromise of 1849, but with some little variation as to the distribution of the fund. A petition was presented by persons entitled in the suit (the Plaintiff not being a party to it) praying that this arrangement might be carried out. Upon this petition an order was made on the 31st of July, 1852, by Vice-Chancellor *Kindersley*, that the compromise mentioned and referred to in the order of the 24th of May, 1849, should be carried into effect so far as it remained unperformed, with certain variations specifically mentioned.

No attempt was made to disturb these orders until the month of May, 1865, when the Plaintiff filed the present bill, praying to have it declared that the orders of the 24th of May, 1849, and the 31st of July, 1852, were fraudulently and improperly obtained, and ought to be set aside, and that the rights and priorities of the various parties might be ascertained, and that various accounts might be taken. The grounds upon which the Plaintiff alleged that the orders in question were fraudulently obtained were, that Mr. *Bull*, who was the solicitor of the Plaintiffs in the suit of *Pearse* v. *Brooke*, shortly after April, 1845, ceased to hold any communication with the Plaintiff or his wife, and without his consent, or that of his wife, and in gross breach of his duty, aided and assisted the Defendants *Timperon* and *Dobinson*, and their solicitors, and others of the Defendants and their solicitors, and fraudulently acted on their behalf against the interests of the Plaintiff; and, in collusion with them, contrived a mode by which the fund in Court in *Pearse* v. *Brooke* should be obtained and divided between the parties to the cause, and that *Bull* accordingly prepared an agreement for compromise, and collusively arranged that a petition should be presented to the Court praying that the agreement might be carried out, upon which the order of the 24th of May, 1849, was made, and, following upon it, the order of the 31st of July, 1852. The Plaintiff further alleged that, under the agreement for compromise, it was agreed that certain sums should be

received by *Dobinson* and the executors of *Timperon* out of the fund in Court, although nothing was due to them at the time of the orders, as *Bull, Dobinson,* and *Timperon's* executors knew to be the fact, and that he first discovered the above facts in the year 1862, by means of certain proceedings in the Incumbered Estates Court in the *West Indies.*

To this bill the Defendant *Dobinson* put in a plea and answer. By his plea, he pleaded the orders of the 24th of May, 1849, and the 31st of July, 1852, which he alleged were respectively passed and entered (not stating that they were enrolled). He then averred that he did not know at, or previously to, the respective times when the petitions for compromise were presented, or the orders made, that nothing was due to *Timperon* (not averring that he did not know that nothing was due to himself), or that he had full, or any, information from accounts, or otherwise, that nothing whatever was at the time of such petitions or orders respectively due to *Timperon* or himself. By his answer he negatived the fraud charged.

The plea having been set down for argument, Vice-Chancellor *Kindersley* overruled the objection that the orders could not be pleaded without having been signed and enrolled (1); but held that the averments of the plea were insufficient, and, on the 11th of December, 1865, made the order now appealed from, that the plea of *Dobinson* should stand for an answer, "with liberty for the Plaintiff to except to the said answer, but so that the Plaintiff shall not require the said Defendant to set out any accounts of the mortgagees or consignees in relation to the estates in question in this cause, or any of them, or in relation to any charges on the said estates, or any of them."

The Plaintiff appealed from this order, and *Dobinson* having died, a common order of revivor was obtained against his executors, merely directing that the suit should stand revived against them, and be in the same plight and condition as it was before the abatement, without anything further.

Mr. *Glasse,* Q.C., and Mr. *T. A. Roberts,* for the Appellant:—

A decree not enrolled cannot be pleaded: *Kinsey* v. *Kinsey* (2);

(1) Law Rep. 1 Eq. 241.

(2) 2 Ves. Sen. 577.

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Mitford on Pleading (1); *Daniell's* Chancery Practice (2); *Seton* on Decrees (3); *Gilbert's Forum Romanum* (4). But if the Court is against us on that, the averments are insufficient to support the plea. The plea cannot, therefore, be allowed, it must either be overruled, or ordered to stand for an answer. The limitation on the right to except should be discharged, for the state of the mortgagees' and consignees' accounts may furnish important evidence in support of the allegation that *Timperon's* executors and *Dobinson* knew that nothing was due to them.

Mr. *Dickinson*, Q.C., and Mr. *W. Druce*, for *Dobinson's* executors:—

The reasoning of the Vice-Chancellor satisfactorily shews that *Kinsey* v. *Kinsey* (5) does not lay down a rule governing a case like the present, where the decree pleaded is the decree which the bill impeaches. The averments are, in substance, sufficient. The proceedings as against the executors are irregular. The order to revive ought to have ordered them to answer the interrogatories served on *Dobinson*, or else they ought to have been served with interrogatories. Suppose *Dobinson* had died after putting in an insufficient answer, and exceptions were pending at his death, no decision on them could be obtained, for a dead man cannot be ordered to put in a further answer: *Mitford* on Pleading (6); *French* v. *Semple* (7); *Martin* v. *Purnell* (8); *Jackson* v. *Davenport* (9). But the substantial question is, whether the restriction on the right to except is proper, and we submit that it is. There is no right to discovery except as to something tending to prove fraud and collusion, and the accounts cannot give any evidence that *Bull*, *Timperon*, and *Dobinson* knew that nothing was due to them, though they might furnish evidence that nothing was, in fact, due to them. The limitation is supported by *Brereton* v. *Gamul* (10); *King* v. *Holcombe* (11); *Bayley* v. *Adams* (12).

Mr. *Roberts*, in reply.

(1) 4th Ed. p. 239.
(2) 3rd Ed. p. 545.
(3) 3rd Ed. p. 1.
(4) Page 183.
(5) 2 Ves. Sen. 577.
(6) 4th Ed. p. 76.
(7) 35 Beav. 376.
(8) 3 W. R. 395.
(9) 29 Beav. 212.
(10) 2 Atk. 240.
(11) 4 Bro. C. C. 439.
(12) 6 Ves. 586.

16 Nov. LORD CHELMSFORD, L.C., after stating the facts, continued:—

The Plaintiff, although he has appealed from the whole of the order, does not object to it any further than as it places a limitation on the power of excepting.

It is the clearly established practice of the Court that a decree not signed and enrolled cannot be pleaded in bar of a suit, though it may be insisted upon by way of answer: *Mitford* on Pleading (1).

The Vice-Chancellor thought that this rule of practice was not applicable to a case where the bill is filed to impeach a decree on the ground of fraud. But as His Honour was of opinion that the plea was informally and defectively pleaded, it was unnecessary for him to decide this question. As no objection is raised to the portion of the decree which orders the plea to stand for an answer, with liberty to except, I shall not consider whether the Vice-Chancellor was right in supposing that in the case of a bill impeaching a decree on the ground of fraud the Defendant might plead the decree in bar of the suit, although it was not signed and enrolled. A plea of this kind, whether the decree is enrolled or not, is so contrary to the maxim *non potest adduci exceptio ejusdem rei cujus petitur dissolutio*, that it can only stand upon the footing of what Lord *Talbot*, in *Pusey* v. *Desbouverie* (2), stated to be the established practice, and consequently the law, of the Court.

The only question in this case is, whether the Vice-Chancellor was right in limiting the liberty to except in the manner which he has done by his order. That a limitation of the liberty to except where the plea is ordered to stand for an answer may be imposed by the Judge, appears from several cases, of which it will be sufficient to mention *Brereton* v. *Gamul* (3), and *Bayley* v. *Adams* (4). The Plaintiff, however, objects that his case materially depends upon the state of the accounts of the mortgagees and consignees in relation to the estates in question in the cause, and that therefore he ought not to be debarred from requiring the Defendant to set out these accounts.

(1) 5th Ed. p. 288.
(2) 3 P. Wms. 317.
(3) 2 Atk. 240.
(4) 6 Ves. 586.

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Now what is the foundation of the Plaintiff's claim to relief from the decree? His case is put entirely upon the ground of fraud. He charges that his solicitor, Mr. *Bull*, betrayed his interests, and colluded with the opposing parties to get possession of the fund in Court, and to distribute it amongst the parties entitled; and that all this was done against the Plaintiff's interest, and without his consent; and with the knowledge of *Bull*, and *Dobinson*, and the executors of *Timperon*, that nothing whatever was due to *Dobinson* and *Timperon's* executors as the mortgagees of the estates and consignees of the produce.

Suppose the Plaintiff could establish this case of collusion between his own solicitor and the Defendants (of course with the addition of his ignorance of the facts until after the orders made) he would be entitled to set them aside, whatever might be the state of the accounts. If he failed in proving a case of collusion, then his claim for relief would altogether fail, being founded upon fraud and upon fraud alone. Under these circumstances it appears to me that it is not necessary to the Plaintiff's case that he should have an opportunity of investigating the mortgagees' and consignees' accounts, which, if entered upon at all, must be carried back to a very remote period. To allow this to be done would be to give him all the benefit which it is his object to obtain by his bill, and virtually to decide the suit in his favour. If he can succeed in setting aside the orders in *Pearse* v. *Brooke* on the ground of collusion he will be entitled to go fully into the accounts.

A preliminary objection was taken by the Defendant, with which I have no difficulty in dealing. Since the decree was made, and while the appeal was pending, *Dobinson* died, and the suit has been revived against his executors. The form of the order to revive is the common order, merely stating the abatement of the suit so far as respects the Defendant, and the transmission of his interest to his personal representatives. Now as the decree gives the Plaintiff liberty to except to the answer, if he should file exceptions and they should be allowed, the executors, it was said, could not put in a further answer, and, the answer being insufficient, the Plaintiff would be entitled to a decree.

Of course, if exceptions are taken to the original Defendant's

answer, and they are disallowed, no difficulty will arise, but if the exceptions should be allowed, I see no reason why the order allowing the exceptions should not require the executors, who are now the Defendants, to answer so much of the bill as the exceptions taken to the answer of the former Defendant extend to. No doubt the executors will be thus placed in a disadvantageous position, but I see no help for it.

The decree of the Vice-Chancellor must be affirmed, and the petition of appeal be dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Matthews & Greetham.*

Solicitors for *Dobinson's* Executors: Messrs. *Druce, Sons, & Jackson.*

L. J. C.
1867
Nov. 7.

In re RICHMOND HILL HOTEL COMPANY.
Ex parte KING.

Bankruptcy—Creditors' Deed—Reasonableness—Company winding up—Liability of the Debtor as Shareholder in a Company for past and future Calls—Bankruptcy Act, 1861, *s.* 192—*Companies Act*, 1862, *s.* 75.

3 Q B 134, 140
4 Ch 276
4 C B 735,
7 Ch 402-3, 4

Shortly before a company was wound up a shareholder executed a deed of arrangement with his creditors, which contained no *cessio bonorum*, but only covenants by the creditors that they would not enforce payment within two years, and by the debtor that he would pay in full at the expiration of that period. The debtor was at that time liable for two calls made by the company, but he did not include them in the schedule sent in to the Registrar, and another call was subsequently made by the official liquidator:—

Held (affirming the decision of *Wood*, V.C.), that the omission of the debts from the echedule was not a ground on which the Court of Chancery could hold the deed to be invalid; that there being no inequality as between creditors, and no fraud, the Court would not judge of the reasonableness of the arrangement as between the debtor and his creditors; and that, so far as related to the calls that were due at the date of the deed, the official liquidator was bound by the deed:

But *held* (reversing the decision of *Wood*, V.C.), that, having regard to the frame and provisions of the deed, which only applied to debts actually due, the official liquidator might proceed against the shareholder for the subsequent calls.

THIS was an appeal by the official liquidator against an order of Vice-Chancellor *Wood*, made in the winding up of the *Richmond Hill Hotel Company, Limited* (1).

John Thomas King was the owner of thirty shares in the company, upon which two calls had been made previously to the year 1866, to the amount of £90. The company was ordered to be wound up on the 21st of November, 1866, at which time *King* was a defaulter as to the whole of the amount due on the calls.

Shortly before the company was wound up *King* executed a deed of arrangement with his creditors. This deed, which was dated the 11th of October, 1866, and was made between *King* of the one part, and his creditors of the other part, recited that he was indebted to the persons referred to as his creditors in divers

(1) Law Rep. 4 Eq. 566.

sums of money, and, by reason of his inability at that time to sell and convert into money certain shares and other personal property then belonging to him, save at a sacrifice which would be prejudicial to the interest of the creditors, and ruinous to himself, he had applied to the creditors to grant him such further credit, time, and license, to enable him to realize his said property and pay his debts in full, as thereinafter mentioned. The creditors then covenanted that they would not sue *King*, or enforce their debts, for two years from the date of the deed, and that the deed might be pleaded in evidence in any action then pending, or thereafter to be brought, during the two years. And *King* covenanted with them that he would pay to each of his creditors the whole of his debt owing to him, with interest at £5 per cent. from the date of the deed, and would, at the expiration of three calendar months from that date, pay to such of his creditors as had, previously to the execution of the deed, commenced any suit or action for the recovery of their debts, such proper and reasonable amounts as they would be allowed for the costs of prosecuting the said actions up to the time aforesaid, if the same were taxed as between party and party: provided that the creditors should, within two calendar months, render to him, or his attorney, or agent, an account in writing of the said costs so incurred by them.

The deed was duly assented to by the requisite majority of creditors, and was duly registered. *King* left with the Registrar the schedule of his liabilities required by the General Orders, but made no mention in it of his liability in respect of the calls, nor did the company assent to the deed.

After the execution of the deed, on the 13th of June, 1867, another call of £3 a share was made on *King* by the official liquidator.

On the 24th of July, 1867, an order was made by the Vice-Chancellor, on the application of *King*, directing that all proceedings against the applicant to enforce the payment of calls should be suspended until further orders, and that the official liquidator should be at liberty to prove for the amount of the applicant's liabilities as to past and future calls as a debt payable by the applicant under his deed of arrangement.

From this order the official liquidator appealed.

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Mr. *Karslake*, Q.C., and Mr. *W. W. Karslake*, for the Appellant:—

First: The deed of arrangement is invalid as against the company, on the ground that the debt to the company was omitted from the schedule of debts, which ought to be read as part of the deed. The consequence would be that the company could not take advantage of the deed. It was an attempt to put some creditors on a different footing to others. *Chesterfield and Midland Silkstone Colliery Company* v. *Hawkins* (1); *Ilderton* v. *Jewell* (2). Secondly: The provisions of the deed are unreasonable. The deed professes to guarantee to the executing creditors no more than they were entitled to before. There is no *cessio bonorum*, and the creditors obtain no consideration for postponing their debts for two years. But even if the company was bound by the deed as to the calls which were due at the date of the deed, the official liquidator is entitled to prove against *King* in respect of the subsequent call.

Mr. *F. North*, for *King*:—

There is nothing unreasonable in the deed of arrangement. The Court will leave the creditors to make their own bargain with the debtor, provided all the creditors are put on an equal footing: *Wood* v. *De Mattos* (3); *Gresty* v. *Gibson* (4); *Stone* v. *Jellicoe* (5). In the present case all creditors, whether assenting or not, could take the benefit of the deed after it had become binding under the Act.

With respect to the future calls, it is expressly provided that a shareholder's liability to future calls may be made the subject of proof in bankruptcy (25 & 26 Vict. c. 89, s. 75). *King's* liability to the calls arose when he became a shareholder, which was before the execution of the deed: *Williams* v. *Harding* (6).

Mr. *Karslake*, Q.C., in reply.

LORD CAIRNS, L.J.:—

If the question in this case related only to the two calls, amounting together to £90, made before the date of the deed of arrangement,

(1) 3 H. & C. 677. 11 Jur. N.S. 469.
(2) 14 C. B. (N. S.) 665; 33 L. J. (C. P. Ex. Ch.) 148. 10 Jur. N.S. 747
(3) Law Rep. 1 Ex. 91. 35 Jur. N.S.
(4) Ibid. 112. 12 Jur. N.S. 94
(5) 3 H. & C. 263. 10 Jur. N.S. 197
(6) Law Rep. 1 H. L. 9; 12 Jur. N.S. 457

I cannot say that I think the case would have admitted of any reasonable doubt. The debtor has executed a deed under the 192nd section of the *Bankruptcy Act*, 1861, which was made between himself of the one part, and his creditors, without specifying any names, of the other part. Every person, therefore, who was a creditor at the date of the deed might have claimed the benefit of the deed, and enforced the performance of its provisions. Therefore there was no ground for saying that it bore unequally on the different classes of creditors, as all might have the benefit of it. It was argued that the bargain contained in the deed was unreasonable, because it did not give the creditors any greater advantage than they would have been entitled to if it had not been executed. But it is not the duty of this Court to judge of the reasonableness of the bargain between the debtor and his creditors; it has only to see that the deed does not bear unequally on the different classes of creditors, and that there has been no fraud or undue influence; and if it does not bear unequally, and if no fraud is shewn, the law has, whether wisely or unwisely, provided that the majority of the creditors shall have power to bind the minority. I therefore agree with the Vice-Chancellor as to the calls which were then due. The only difficulty which I have felt relates to the last call, which was made after the date of the deed. It does not appear that there was any argument before the Vice-Chancellor on this point, so that I have not the advantage of his opinion on the question. The 75th section of the *Companies Act*, 1862, provides that the liability of a contributory to calls shall be a debt in bankruptcy, and that an estimated value shall be set upon future calls, and it was argued that this applies also to a proof under an arrangement deed. But the deed in this case is not in the form given in Schedule D. of the *Bankruptcy Act*, 1861; it contains no *cessio bonorum*. Therefore this is not one of those deeds as to which the Act provides that the law and practice of bankruptcy should apply. It is a special bargain between the debtor and his creditors, and the Court must take the deed as it stands, and must ascertain what its meaning is. The whole of the recital would seem to point to debts due *in præsenti*, which the debtor was to be allowed time to pay, without making his property subject to process. Then follows the covenant by creditors

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not to enforce for two years the debts "now due and growing due from him upon any security or otherwise;" and then the covenant by *King* that he would at the end of two years pay to each of his creditors "the debt owing by him to such creditor, with interest thereon at the rate of £5 per cent. from the date of these presents." Now it would be somewhat absurd to suppose that he was to pay interest from the date of the deed on calls which might not be made for six or twelve months after that date. The covenant then goes on to provide that at the expiration of three calendar months he should pay to those creditors who had commenced actions the amount of costs incurred in their actions, provided they should, within two calendar months, render an account of such costs. It might well be, that the question of future calls was not considered at that time; or it might be, as seems probable, when we look at the schedule, that the debtor, who appears to have been a shareholder in several companies, and to have put down specific sums which were due from him for calls already made in some of them, but to have avoided including his liability under future calls, thought that if such liability were included the whole scheme of the deed would be upset, and he would fail to obtain the assent of a sufficient majority of creditors to give effect to the deed. But I do not lay any stress on this point, but rest upon the words of the deed; and I must hold that these words do not include future calls. Therefore, on this point I must differ from the Vice-Chancellor, and must decide that the order, so far as it applies to them, must be discharged.

Solicitor for the Official Liquidator: Mr. *F. W. Dolman.*
Solicitors for Mr. *King:* Messrs. *Marshall, Westall, & Roberts.*

In re BEAUJOLAIS WINE COMPANY.

L. J. R.
1867
Nov. 15, 21, 22.

Voluntary Winding-up under Supervision—Rights of dissentient Shareholders—Discretion of Court—Companies Act, 1862, *ss.* 147, 149.

The Court will not, in general, at the instance of a contributory, interfere with a voluntary winding-up by ordering it to continue under supervision, unless there has been fraud or undue influence in passing the resolution.

Decision of the Master of the Rolls reversed.

THIS was an appeal from an order made by the Master of the Rolls, by which he directed the voluntary winding up of the *Beaujolais Wine Company, Limited*, to be continued under the supervision of the Court.

The company was formed in 1860, and was registered under the provisions of the *Joint Stock Companies Act*, 1856. The capital originally consisted of £20,000, divided into 1000 shares of £20 each. But the capital had been increased, under a power contained in the articles of association, by the addition of 500 shares, making a total capital of £30,000, divided into 1500 shares. Of this capital half, £15,000, had been paid up.

The company for some time after commencing business realised considerable profits, but in 1865, and subsequently, they paid no dividends, and had latterly been carrying on the business at a loss. By the balance sheet for the year ending the 31st of December, 1866, it appeared that the assets of the company amounted to £15,312 19*s.* 8*d.* in addition to the uncalled capital (£15,000), making in all £30,312 19*s.* 8*d.*, and that the debts of the company amounted to the sum of £3400 to debenture holders, and £531 16*s.* 10*d.* to other creditors.

The amount of assets was made up by reckoning the stock of wine, at cost price, at £8166 13*s.* 3*d.*, but it appeared that at a meeting of the shareholders, held in 1866, the directors were authorized to sell the stock of wine at half the cost price, namely, £3 10*s.* a hogshead; the cost price being £7 a hogshead. Making allowance, however, for this, it appeared that the assets were amply sufficient for payment of all the debts.

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There were only twenty-four shareholders, including the Petitioner, Colonel *Wragge*, who held fifty shares in the company.

A short time before the presentation of the Petition, Mr. *Grazebrook*, who held debentures to the amount of £300, and was also a shareholder, served a notice upon the company, under the 80th section of the *Companies Act*, 1862, requiring the payment of his debt within three weeks. This demand was not complied with, but, in consequence of the subsequent proceedings of the company, *Grazebrook* took no ulterior steps.

On the 25th of April, 1867, an ordinary general meeting of the shareholders was held, at which there were eight shareholders present in person, holding 840 shares; and six by proxy, holding 297; making altogether 1137 shares represented out of 1500. At this meeting a resolution was moved by the chairman, and carried unanimously, for the voluntary winding up of the company, and the appointment of Mr. *G. Mackenzie* as voluntary liquidator. The Petitioner, Colonel *Wragge*, was present, but did not oppose the resolution. Afterwards, however, he proposed another resolution, that the company should be wound up by the Court of Chancery, but the resolution fell to the ground for want of a seconder. *Grazebrook* was also present at this meeting, and expressed himself satisfied with the resolution, and protested against the Petitioner's resolution for a compulsory winding-up.

On the same day the Petitioner presented a Petition for a compulsory winding up of the company, in which he stated that the loss in trading by the company in the year 1866 was £1716 14*s*., that it was probable that the loss would increase, that the demand of *Grazebrook* had not been complied with, and that the company was unable to pay its debts.

When the Petition was heard before the Master of the Rolls, his Lordship, understanding that the company had already decided on a voluntary winding-up, ordered the Petition to stand over till the formal resolutions for that purpose had been passed.

Accordingly, on the 27th of May, and the 17th of June, extraordinary meetings were held, at which resolutions were passed and confirmed for the voluntary winding up of the company, and for the appointment of two persons as liquidators.

At the meeting of the 27th of May, there were present in person

seven shareholders, representing 700 shares; and eight by proxy, representing 377, making a total of 1077 shares. The resolution for winding up voluntarily was passed without opposition, except from the Petitioner, who subsequently moved that the liquidator should be appointed by the Court of Chancery, but the resolution was not seconded. The original resolutions were unanimously confirmed at the subsequent meeting of the 17th of June.

Under these circumstances the Petition came on again before the Master of the Rolls, on the 25th of July, when his Lordship ordered the winding-up to be continued under the supervision of the Court, and from this order the company appealed.

Mr. *Baggallay*, Q.C., and Mr. *H. M. Jackson*, for the company :—

When the Petitioner came before the Master of the Rolls originally there was no case for a compulsory winding-up order. The company was not insolvent, and the only creditor who had made a claim had withdrawn it: *In re Suburban Hotel Company* (1). His Lordship would at that time have made an order for a voluntary winding-up under the supervision of the Court, but as the voluntary winding-up had not been formally decided on, he had no jurisdiction to do this, and therefore ordered the Petition to stand over, in order that the requisite resolution might be passed by the company. But the Petition ought to have been dismissed at once. The effect of its standing over was, that there was a pressure put upon the company in their deliberations which ought to have been avoided.

The Court had no jurisdiction to make the order appealed from on this petition. The order for supervision can only be made on a Petition founded on the voluntary winding-up; whereas this Petition was presented before the resolutions for winding up had been passed.

The Master of the Rolls appeared to consider that any contributory had a right to an order for the supervision of the Court. But that is not a correct view of the law. The Court has a discretion in the matter, and will be guided in its course by the wishes of the contributories and the creditors. If there is no fraud or undue influence the resolution of the meeting will be held binding upon the dissentient minority: *In re London and Mer-*

(1) Law Rep. 2 Ch. 737.

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cantile Discount Company (1); *In re Imperial Bank of China, Hindustan, and Japan* (2). In the present case the shareholders and creditors were all satisfied with the voluntary winding-up. The Petitioner was the only dissentient.

The effect of interposing the supervision of the Court would be to cause great delay and serious inconvenience. By the 153rd section of the *Companies Act*, 1862, all contracts and dealings with the assets and shares of the company between the commencement of the winding-up and the date of the order for supervision are made void. This in itself will cause great embarrassment.

Mr. *Southgate*, Q.C., and Mr. *Graham Hastings*, for the Petitioner:—

The company was in such a condition at the time of the original hearing of the Petition that an order for compulsory winding up might have been then made. The company had failed to satisfy *Grazebrook's* claim; and not only was the business carried on at a loss, but all parties were agreed that it must be discontinued, and the company wound up; and the only question was, how it was to be done. This distinguishes the case from that of *In re Suburban Hotel Company* (3).

The Court has a discretion as to making an order for supervision; and in exercising that discretion it ought not to be guided entirely by the wishes of the majority of the contributories, but it should protect the interests of the minority. A single partner in an ordinary partnership may come to the Court to wind up the partnership. That right is not taken away by the Act, but another mode of proceeding is substituted, and the fact of the Petitioner standing alone ought not to be a bar to his obtaining relief.

The control of the Court is beneficial for all parties. In the absence of some supervision the voluntary proceedings may drag on for an indefinite time: *In re The Fire Annihilator Company* (4). At least no real inconvenience can result from it, and the Court of appeal will not lightly interfere with the decisions of an inferior Court where the matter is purely one of discretion.

Mr. *Baggallay*, in reply.

(1) Law Rep. 1 Eq. 277.
(2) Ibid. 1 Ch. 339.
(3) Law Rep. 2 Ch. 737.
(4) 32 Beav. 561.

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SIR JOHN ROLT, L.J. :—

The first question I have to determine is, what was the order that ought to have been made in May, 1867, when the Petition was first before the Master of the Rolls? The company was incorporated in the year 1860 under the Act of 1856. All parties have assumed, and I take it for granted rightly, that the case is to be disposed of under the provisions of the Act of 1862. Colonel *Wragge*, the Petitioner, became a shareholder to the extent of fifty shares in December, 1861. He makes a complaint in his Petition of having been improperly induced to join the company, which I should not have referred to except for the purpose of saying that the charges appear to me to be of the class of irrelevant allegations referred to in one of the cases before Lord Justice *Turner* as improperly introduced. They are very loose, and if they had been relevant, still they come to nothing. A gentleman of mature age, and competent to manage his own affairs, says he was induced to take shares because some gentleman connected with the company said he would get 12 per cent. It has nothing at all to do with the case before me, and I regret to see such facts unnecessarily introduced into this case. The facts which were before the Court when the Petition first came before the Master of the Rolls, and which are not altogether immaterial, are these :—[His Lordship then referred to the facts as mentioned above, and continued :—]

Those, I believe, are the precise facts, and all the facts that exist, and there was no dispute upon them at the time the winding-up order was made in May, 1867. I am of opinion, upon that state of facts, that it was not a case in which it would have been just and equitable to order a compulsory winding-up. The company had commenced their business within a year of their incorporation, and were still continuing it; they were not, within the sense of the 4th head of the 79th clause of the *Companies Act*, 1862, unable to pay their debts—that is my conclusion from the evidence, and I think it was admitted by the counsel for Colonel *Wragge* that this was so. Then comes the simple question, whether, under these circumstances, it was just and equitable that the company should be wound up compulsorily. I am of opinion it was not. In a case where the assets were sufficient to pay all the debts of the concern, where no creditor was insisting on its being wound up

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compulsorily, where every creditor was satisfied that a winding up by themselves would answer all purposes, where every contributory, except Colonel *Wragge* himself, took the same view, I think it would have been unjust and inequitable to order that company to be wound up compulsorily.

It is unnecessary to inquire whether the Master of the Rolls thought it was a fit case for winding up or not—that is disputed at the bar—but whether it was right or not that the company should be wound up, I think the matter should have been disposed of at the time. As a general rule, it is expedient when any litigious proceeding is ripe for hearing, and all parties have had full opportunity of tendering their evidence—though certainly it is a rule not without exception—then to dispose of it, and I think more justice would have been done in this case if it had been decided at that time. If it was a case for winding up compulsorily it would have been better for the parties to have had that order made; if enough had not been made out for winding up compulsorily, I do not think there is any single circumstance that required it should stand over. I can hardly agree with some of the suggestions made at the bar, that the Master of the Rolls desired it to stand over to put a stress, as it were, upon them with respect to the voluntary winding-up. The Legislature meant that the consent to wind up should be purely voluntary; and supposing there is no occasion to order a compulsory winding-up, to say, "I will not dismiss the Petition, but I will let it stand over to induce the company to come to a voluntary winding-up," I think is not a sufficient reason; nor do I think the Master of the Rolls intended anything of the kind. However, his Lordship did direct the Petition to stand over, and no appeal was brought, and then it came on again on the new facts in the month of July; and the parties having submitted to the order of the Master of the Rolls, and having taken time, and allowed it to come on the second time in July, 1867, the Petitioner is, in my opinion, entitled, notwithstanding my view of what would have been the proper order on the first occasion, to have the case dealt with according to the new facts.

Now, what are the present facts? There has been, in due form, a resolution passed at two meetings of the company requiring that the company shall be wound up voluntarily, liquidators have

been duly appointed, and the first question that arises is this: Is it a matter of right for one dissentient shareholder, after a resolution for voluntarily winding up has been duly passed by the company, to say that he will have that voluntary winding-up brought under the supervision of the Court? Mr. *Southgate* at first said he would not contend that; upon consideration, however, he said it was clear that before the Winding-up Acts one partner might insist on having a dissolution and a winding-up under the authority of the Court, even though every one but himself desired there should be no suit on the subject, and unless that right is taken away by the Act he would contend that right still remains. I think that argument cannot be sustained. No doubt the Acts were intended to impose some restraint on, as well as to give some facilities for, the winding up of companies, but it is not possible to say, unless you can find some special provisions in the Act of Parliament, that it is of right for any one dissentient to say he will have the proceedings brought under the supervision of the Court. I doubt very much whether the Master of the Rolls thought there was such a right, for he went on to explain the great advantages that would undoubtedly result from the supervision of the Court, and so he must have considered that, though not of right, it was just and equitable to continue the winding-up under the supervision of the Court. Now, I can find nothing in the Act that points out the circumstances under which the Court shall determine that a voluntary winding-up shall be continued under the supervision of the Court, or the contrary. I am aware of nothing that controls the discretion given by the 147th section, which enacts that when a resolution has been passed by a company to wind up voluntarily, the Court may make an order directing that the winding-up shall continue under the supervision of the Court, "with such liberty for creditors, contributories, or others to apply to the Court, and generally upon such terms, and subject to such conditions, as this Court thinks just." And this was the view of Lord Justice *Turner*, as expressed in the passage that has been read during the argument, more than once, in the case of the *Bank of Gibraltar and Malta* (1). There his Lordship said (2): "It was stated on the part of the Appellants, in the course of the argument before us, that they did not desire

(1) Law Rep. 1 Ch. 69. (2) Law Rep. 1 Ch. 72.

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an order that the company should be wound up by the Court, if they could obtain an order that it should be wound up under the supervision of the Court, and the first point, therefore, which I propose to consider is, whether the Appellants are entitled to such last-mentioned order. Now, the Act, no doubt, by the 147th section gives full power to the Court to make such an order, but it seems to me to leave it absolutely and entirely in the discretion of the Court whether the order shall be made or not. Neither in the section referred to, nor in any other part of the Act, so far as I have been able to find, has the Legislature in any way defined the circumstances by which the Court is to be guided in the exercise of this discretion. I think, therefore, that in determining the question whether such an order should be made or not we must look to the facts on which the application for the order is grounded, and consider whether those facts present a case rendering it proper that the order should be made with a view to putting in force some of the provisions of the Act which would be available if the order were made, but would not be available under a mere voluntary winding-up. How then does this case stand when looked at from this point of view?"

That is the question which it remains for me to answer in the present case. However, before I look at the facts in this point of view, I may say that what was there said has my entire concurrence, except that I think the Legislature has given some assistance to the Court, in the 149th section, which relates to the question whether a company is to be wound up altogether by the Court, or subject to the supervision of the Court. The 149th section is:—"The Court may in determining whether a company is to be wound up altogether by the Court, or subject to the supervision of the Court, in the appointment of liquidator or liquidators, and in all other matters relating to the winding-up subject to supervision, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence, and may direct meetings of the creditors or contributories, to be summoned, held, and regulated in such manner as the Court directs, for the purpose of ascertaining their wishes, and may appoint a person to act as chairman of any such meeting, and to report the result of such meeting to the Court: in the case of creditors regard shall be had to the value

of the debts due to each creditor." This section, which appears to me not unimportant, is the only provision I can find to assist the Court in its discretion whether the winding-up shall be made subject to supervision or not. What are the facts to which we have now to apply this state of things? It was said by Mr. *Hastings* that this, though no doubt a judicial discretion, was not of such a kind as the Court of appeal would lightly take upon itself to review; that if the exercise of the discretion in the Court below was not conclusive, still it ought to have very great weight with a Court of appeal. I quite agree it ought to have great weight, and the great experience of the Master of the Rolls entitles his opinion to especial respect; but it is impossible to say that it is not my duty to exercise a discretion on the subject. It is a question which has to be concluded on the appeal, and it is my duty to give my judgment upon it.

The subsequent facts are these:—When the matter was last before the Master of the Rolls there had been the meeting of the 27th of May to wind up voluntarily, at which liquidators were appointed; and there had been another meeting on the 17th of June, and at these meetings the shareholders and the creditors were all unanimous, except Colonel *Wragge*, that the winding-up should be voluntary; and I think there is no single fact of any kind, other than that, which places the case in a different position from that which it was in when it came before the Master of the Rolls on the first occasion. The first question is, then, is there any scintilla of evidence to show that this unanimity was unfairly produced, that there was any unfair voting, or any undue influence brought to bear upon those who constituted the majority. There is literally none. Mr. *Hastings* very ingeniously endeavoured to shew that some of the shareholders held a special position in the company; but it only amounted to this, that there were several of the gentlemen in whom the rest of the shareholders had confidence, as in all these cases there must be; and because they had confidence in them they voted with them, not from any knowledge of the merits of the case, but from the confidence they placed in them. A more reasonable motive I can hardly conceive; and if that be so, it almost concludes the case; because I entirely agree with what was said by Vice-Chancellor *Wood*, in the case of

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the *London and Mercantile Discount Company* (1), which has been cited, and which, I think, is of great importance.

His Honour there says (2):—"The Court can hardly be too careful in adhering to the course which seems to have been thought desirable by the Legislature when it gave power to companies to wind up voluntarily. The Legislature has thought that the shareholders should meet and regulate that part of their own business, as they would regulate any other part of it, by the views of the majority; and provided the votes of the majority are given fairly and reasonably there is no ground whatever for the interference of the Court. At the same time, no doubt it was foreseen that there might arise cases of such decided undue influence, and such a course of overbearing authority by those whose acts were sought to be impeached, as would render it desirable that the Court should interfere, and therefore in such cases there was reserved to the Court the power of superintending a voluntary winding-up by putting in force its coercive jurisdiction where anything improper should be attempted on the part of those who might endeavour to screen their own actions by procuring a voluntary winding-up. It is only by bringing the case as near as possible to the latter alternative that the Petitioners could be entitled to entertain any hope of success in the attempt to obtain the order sought."

It is not for me to say there may in no case be circumstances which would induce the Court to interfere with a voluntary winding-up, although the votes of the majority were given fairly and reasonably. I will not anticipate the cases that might arise. We have the fact that no parties are coming to ask for the interference of the Court except Colonel *Wragge*, and there is no such special case here.

If, then, the vote was honestly given why should not the parties determine for themselves how they will have the company wound up. What are the facts? That the concern has been carried on some time without profit, but having assets, in any view of the case, ample to pay the debts, excluding the £15,000 unpaid calls, and no creditor insisting on payment, which could prevent the voluntary winding-up in the way they have decided on. There is

(1) Law Rep. 1 Eq. 277. (2) Law Rep. 1 Eq. 282.

no circumstance, as it appears to me, which can justify its being brought under the supervision of the Court. I place implicit reliance on the Master of the Rolls' experience, that under orders for the voluntary winding up of companies there is often great difficulty and inconvenience created by the liquidator and those who have the power in their hands—no mode of winding up such companies can be without inconvenience. But what exists on the other side? Here the majority, including the creditors, as far as appears, say, "Let us have our own affairs in our own hands; we have confidence in one another, and in the persons we have appointed liquidators, and we wish to avoid the expense of being wound up under the supervision of the Court." It is objected, on the other hand, that in a voluntary winding-up the liquidators are practically under no control at all—that under the supervision referred to in the 138th section there must be an originating summons. Now is that not the right course to take? You have had here the expense of a Petition to get the order for coming under supervision; you have had the whole of the expense at the Rolls, and the whole of the expense here; all that, if you had followed the provisions of the Act, would have been saved. Where you come to a question of wrongful doing by those who have the voluntary winding up you have ample protection, not by presenting a Petition, but by coming to the Court upon what has been called an originating summons. There is a balance of convenience and inconvenience. I have, on the one hand, the convenience of allowing the opinion of the large majority of the contributories and creditors as to the mode of winding up to prevail over the disapprobation of one of the body; and on the other, I have the inconvenience of the expense, which may be utterly unnecessary, of coming to this Court and obtaining and working under the supervision of the Court, when the wrong, if there be any wrong by mismanagement, can be cured by applying to the Court on an originating summons.

Under the circumstances I cannot consider that a case is made out for bringing this voluntary winding-up under the supervision of the Court.

It is unnecessary to enter into the preliminary objection taken by Mr. *Baggallay,* and I desire to express no opinion upon that

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point. Upon the whole, therefore, I am satisfied that the original Petition in May ought to have been dismissed; that the Petitioner is entitled to have it considered now as it was considered in the month of July: but I think that at that time he clearly failed in shewing a title either to a compulsory winding-up, or a title to bring the voluntary winding-up under the supervision of the Court, and the Petition will, therefore, be dismissed with costs; there will be no costs of this appeal, except that, if necessary to say so, the voluntary liquidator will take his own costs out of the estate.

Solicitors for the Petitioner: Messrs. *Harper, Philpot, & Co.*
Solicitors for the Company: Messrs. *Bischoff, Coxe, & Bompas.*

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Ex parte BRUNDRIT. *In re* CALDWELL.

Bankruptcy Act, 1861, *s.* 159—*Contracting Debts without reasonable Expectation of being able to pay.*

In order to subject a bankrupt to the penalties of the *Bankruptcy Act*, 1861, s. 159, as having contracted debts without reasonable expectation of being able to pay the same, it must be shewn that there are particular subsisting debts which at the time when they were contracted he could not reasonably have expected to be able to pay, and it is not enough to shew that he contracted in the aggregate a greater amount of debts than he could reasonably expect to pay.

THIS was an appeal, by a creditor, from an order of discharge granted to the bankrupt by the Judge of the County Court of *Cheshire*. The ground of appeal was, that the bankrupt had contracted debts without any reasonable expectation of being able to pay them.

The bankruptcy took place in April, 1867, on the bankrupt's own application. From his statement of accounts it appeared that his debts amounted to £199 13*s.*, his assets to £6 2*s.* 9*d.* The Appellant, Mr. *Brundrit*, was a creditor for rents which the bankrupt had collected as his agent, and had recovered judgment on that ground for £150 and costs. The bankrupt entered him in his

accounts as a creditor for £114, and claimed a set-off of £69. The bankrupt owed to *Stelfox*, a grocer, £50 for provisions, and to *Rigby*, a draper, £20. The other debts were very small.

The bankrupt, when examined, stated that ever since 1865 he had had no occupation, had only earned £4 10*s*., and had lived on the income of his wife's property, the amount of which he could not tell, but guessed it at about £130 a year. He said that his rate of expenditure had been above that for two years, and that he had run in debt for the difference. He could not tell when *Stelfox's* debt was contracted, but believed that *Rigby's* was contracted about two years and a half ago. He said he had collected rents for Mr. *Brundrit* from February, 1865, to September, 1866, and had collected about £130.

Mr. *De Gex*, Q.C., for the Appellant:—

The bankrupt having no resources, except a fixed income from his wife's property, has been systematically living beyond that income. He must therefore be considered to have contracted his debts without reasonable expectation of being able to pay them, and to have brought himself within the *Bankruptcy Act*, 1861, s. 159.

[The LORD JUSTICE LORD CAIRNS:—Is there any particular debt owing, as to which you can shew that at the time when it was contracted the bankrupt might not reasonably believe that he should be able to pay it?]

I submit that it is not necessary to fix upon a particular debt. If so, a bankrupt might get himself out of the section by paying his debts in the reverse order of date.

The bankrupt did not appear.

LORD CAIRNS, L.J.:—

I do not think that there are in this case materials enabling the Court to say that the bankrupt has brought himself within the 159th section of the Act. This section, being a penal section, must be construed strictly; and the practice of the Court has always been to require the debts which are alleged to have been con-

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tracted without reasonable expectation of being able to pay them to be specified, so that the Court may apply its mind to all the circumstances under which they were contracted. Here nothing is distinctly shewn as to the times when the debts accrued, or as to the circumstances under which they were contracted. The bankrupt having received rents, probably the debt in respect of them must be considered to have accrued at the time when they were received, and whether a debt arising in that way can ever be considered as contracted without a reasonable expectation of being able to pay it may well be doubted; but it is enough for the present purpose to say, that it is not made to appear that the bankrupt might not when he contracted his debts reasonably have expected to pay them out of the accruing income of his wife's property. It is said that he systematically lived beyond his income, and therefore must have contracted debts without any expectation of being able to pay them. But if a man having £100 in hand were to contract debts to that amount, it would be impossible to say that he contracted them without reasonable expectation of being able to pay them. If he then were to contract further debts to the same amount, and apply the £100 in paying them, so as to leave only the earlier debts subsisting, blameable as such conduct would be, I do not think that it could be brought within the provisions of this section, there being no debt proveable under his bankruptcy which he had contracted without a reasonable expectation of being able to pay it.

Solicitors for the Appellant: Messrs. *Makinson & Carpenter.*

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Bankruptcy Act, 1849, s. 139—*Bankruptcy Act*, 1861, s. 116—*Choice of Assignees—Right of Creditors under* £10 *to vote.*

Sect. 139 of the Bankruptcy Act, 1849, so far as it confines the right of choosing an assignee to creditors whose debts amount to £10 or upwards, is repealed by sect. 116 of the Act of 1861, which gives all the creditors a right to vote.

THIS was an appeal motion to discharge an order of Mr. Registrar *Hill*, of the *Birmingham* District Court of Bankruptcy, confirming the choice of Mr. *Richardson* as creditors' assignee, and to set aside the choice of such assignee.

On the 6th of September, 1867, a meeting was held for the choice of assignees of the estate of the bankrupt. The total of debts proved was £589 18*s.* 5*d.* The Appellant *Moss* had proved for £287 16*s.* 9*d.*, and obtained powers of attorney from three small creditors, whose debts together amounted to £8 13*s.* 8*d.* He was proposed as assignee, and supported by the votes of himself and the above three creditors. He had thus a majority in value, the aggregate being £296 10*s.* 5*d.*

The debts of all the other creditors amounted together to £292 19*s.* All those of them whose debts were above £10, making in all £290 18*s.* 11*d.*, voted for Mr. *Richardson*, who thus had a majority in value if the votes of creditors under £10 were rejected.

The Registrar held that creditors whose debts were under £10 had no right to vote, and he accordingly confirmed the choice of Mr. *Richardson*. Mr. *Moss* appealed.

Mr. *Little*, Q.C. (Mr. *Finlay Knight* with him), for *Moss*:—

The Bankruptcy Act, 1849, s. 139, provides for the choice of assignees by the majority in value of creditors whose debts exceed £10, and provides also for the rejection or removal of an unfit person. The Act of 1861, s. 116, provides for the choice of an assignee by the majority in value of the creditors who have proved, and contains a power of rejection, but none of removal, and no

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doubt it was in order to save the last power that the section was not expressly repealed. The regulations as to choice are inconsistent, and the former are repealed under sect. 230 of the latter Act, as being a part of an Act inconsistent with this Act. Sections 109, 185, 187 of the Act of 1861 give certain powers to majorities differently constituted, and the change of language cannot be supposed to have been made without a purpose. [He was then stopped by the Court.]

Mr. *Kay*, Q.C. and Mr. *Bardswell*, for *Richardson* :—

The old enactment was intended to guard against what has been done here—getting in the votes of creditors whose interest is so small that they will give them to any one who asks for them; and we submit that it is not repealed. It is not included in Schedule G., the frame of which evidently shews that the general plan of the Legislature was to repeal in express terms all such clauses in the Act of 1849 as it was intended to repeal, and the words "all other Acts or parts of Acts which are inconsistent with this Act," ought, on a fair construction, to be held to apply only to parts of other Acts. The object of sect. 116 was to change the time of the appointment of assignees from the first public sitting to the first meeting of creditors, and the two clauses must be read together, as provided by sect. 232 of the later Act. The section cannot have been left unrepealed, as suggested by Mr. *Little*, to save the power of removal, for that is provided for by sects. 124, 139. It cannot have been left standing for any other purpose than that of defining the kind of majority required.

[The Lord Justice Lord Cairns :—Suppose all the creditors were under £10.]

That difficulty might occur under the old Act if the bankruptcy was on the bankrupt's own Petition.

[The Lord Justice Lord Cairns :—Suppose your contention right, such a majority as voted for Mr. *Moss* might, under sect. 124, remove Mr. *Richardson* the next day.]

That creates a difficulty, but is not, we submit, sufficient to remove the effect of the 139th section being left unrepealed. Section 192, clause 1, indicates the intention of the Legislature.

Re Dobbs (1) is a well-considered judgment of the Commissioner of the *Bristol* Court on the point.

Lord Cairns, L.J. :—

This case seems to me not to admit of any reasonable doubt. It is true that the 139th section of the Act of 1849 is not *eo nomine* repealed by the Act of 1861; but the Act of 1861, after repealing, by sect. 230, the Acts and parts of Acts set forth in the Schedule G., to the extent to which they are in the schedule expressed to be repealed, proceeds to say that "all other Acts or parts of Acts which are inconsistent with this Act are repealed." Therefore any part of any previous Act (and I think that must mean any previous Act, whether mentioned in the schedule or not) inconsistent with the Act of 1861 is repealed, just as much as if the section had been mentioned by name in the schedule. The first question, therefore, to be determined is, whether the 139th section of the Act of 1849 is inconsistent with the 116th section of the Act of 1861. If it is, it is repealed absolutely and distinctly. Now the former section says in substance that the assignees of the bankrupt's estate shall be chosen by the creditors who have proved debts to the amount of £10 and upwards, and under that Act if any creditor who had not proved a debt of £10 presented himself to vote for the choice of assignees, he must have been told that he had no vote and must leave the meeting. The 116th section of the Act of 1861, on the other hand, says that it shall be competent to the majority in value of the creditors who have proved debts to choose an assignee of the estate, making no distinction between one creditor and another, or between the class whose debts exceed £10, and the class whose debts are below £10. It seems to me that clearly the later Act gives the choice to a larger body than the former Act, and that therefore the section of the former Act is inconsistent with the corresponding section of the latter. If so, then the section of the former Act is repealed by the general words which I have read. That disposes of the argument founded on the 232nd section, for that section does not say that the two Acts are to be read together, but only that the later Act is to be read together with so much of the former Act as remains

(1) 15 L. T. (N.S.) 74.

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unrepealed. If I am right in the conclusion that the 139th section is repealed by the general words which I have read, it follows that, at all events as regards the creditors who are to choose an assignee, it is not to be read along with the Act of 1861. Even if the matter had rested here, I should have felt no doubt upon the question, but the conclusion to which I have come seems to me to be very much fortified by the 124th section of the Act of 1861, which gives to creditors a power which they had not before possessed of removing assignees, and this power is given, not to creditors whose debts are above £10, but to the majority in number and value of the creditors, that is, of all the creditors. If, then, I were to hold that creditors over £10 are to choose the assignee, the consequence would be, that an assignee chosen to-day might be removed to-morrow, because the removing body might be a body possessing different inclinations from the electing body, and the proceedings of the bankruptcy might thus be brought to a dead lock. I am of opinion that the choice of Mr. *Richardson*, and the Registrar's approval of it, must be discharged, and that a new choice must be made.

Solicitors for the Appellant: Messrs. *Church, Sons, & Clarke.*
Solicitors for the Respondent: Messrs. *Gregory, Rowcliffe, & Co.*

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MAUGHAN *v.* BLAKE.

Practice—Amendment of Bill at the Hearing—Adding Co-Plaintiffs—Misjoinder.

The sole Plaintiff in a creditor's administration suit alleged that she was the personal representative of a creditor of the testator. At the hearing it appeared that the Plaintiff was not his representative; and she then applied for leave to amend the bill by adding the true representatives as co-Plaintiffs with her, and by inserting allegations to shew that she had a beneficial interest in the debt which was the foundation of the suit.

The Court (affirming the order of the Master of the Rolls) gave leave to make the amendments; and it was held that, although the original Plaintiff was herself an accounting party to the creditor's estate, there was no misjoinder in joining her as co-Plaintiff with the legal personal representatives.

In the original bill the personal representative of the testator whose estate

was sought to be administered was made a Defendant in another capacity; but there was no statement that she filled the character of personal representative. Leave was given at the hearing to amend the bill by alleging her title as such representative.

THE bill in this case was filed by *Ann Eliza Maughan*, on behalf of herself and all others the creditors of Sir *F. Blake*, for the administration of his estate.

The bill stated that the testator died indebted to *Ann Collingwood* upon three bonds; that *Ann Collingwood* died several years since, leaving *Archibald Dickson* her executor; that *Archibald Dickson* died in 1836, having appointed Sir *A. Dickson* and *William Hill* his executors, both of whom died without proving the will; that the Plaintiff had obtained letters of administration with the will annexed to *Archibald Dickson*, and that the Plaintiff had also obtained letters of administration to *Ann Collingwood*, with her will annexed, and that she had thereby become the legal personal representative both of *Archibald Dickson* and *Ann Collingwood*.

The Plaintiff admitted that she had received about £1200, leaving £2271 16*s.* 1*d.* still due on the bonds, which she now claimed.

When the cause came on for hearing it appeared that the statements in the bill were incorrect; that *William Hill* had in fact proved the will of *Archibald Dickson* in the Consistory Court of *Durham*, and that letters of administration to *Ann Collingwood* had been refused by the Court of Probate to the Plaintiff since the filing of the bill, and had been granted instead to *G. Reed* and *J. P. Eden*, the executors of *William Hill*.

The Plaintiff, however, being beneficially interested under the will of *Ann Collingwood*, applied for leave to amend the bill by adding *G. Reed* and *J. P. Eden* as co-Plaintiffs with herself, and at the same time introducing the necessary statements to shew the nature of her interest.

It also appeared that although *Ellen Blake*, the legal personal representative of the testator, was a Defendant in another capacity, there was no allegation in the bill that she was the representative of the testator, so that the estate of the testator appeared to be unrepresented. The Plaintiff therefore asked for leave to

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add the necessary allegations, shewing that *Ellen Blake* was the personal representative of Sir *F. Blake*.

The Master of the Rolls granted leave to make these amendments, and the Defendant now moved to have the amended bill taken off the file, or to have the amendments expunged.

Mr. *N. R. Smart* (with whom was Mr. *Jessel*, Q.C.), for the Appellant:—

It is entirely in the discretion of the Court whether the Plaintiff should be allowed to amend his bill at the hearing; but the Court will not exercise this discretion in an arbitrary manner: *Tasker* v. *Small* (1). In the present case the amendments amount to a new bill. The Plaintiff's case is entirely changed; and it is contrary to the practice of the Court to allow amendments under such circumstances: *Milligan* v. *Mitchell* (2); *Bateman* v. *Margerison* (3); *Goodwin* v. *Goodwin* (4); *Watts* v. *Hyde* (5); *Milward* v. *Oldfield* (6); *Innes* v. *Jackson* (7).

But if the amendments are allowed they will be useless, for no decree could be made in favour of the original Plaintiff, according to her own statement, because she is an accounting party to her co-Plaintiffs, as she has received money on account of the estate which they represent. It would be necessary again to amend and make her a Defendant: *Jacob* v. *Lucas* (8); *Griffith* v. *Vanheythuysen* (9).

Mr. *Southgate*, Q.C., and Mr. *Babington*, for the Plaintiff, were not called on.

SIR JOHN ROLT, L.J.:—

This being a matter for the discretion of the Court, although I am not precluded from reviewing the order which has been made, yet I cannot say that I ought to disturb it. There is no objection to the addition of co-Plaintiffs, and that being so, it follows that apt words may be introduced to shew their title. In

(1) 3 My. & Cr. 63.
(2) 1 Ibid. 433.
(3) 6 Hare, 496.
(4) 3 Atk. 370.
(5) 2 Ph. 406.
(6) 4 Price, 325.
(7) 16 Ves. 356.
(8) 1 Beav. 436.
(9) 9 Hare, 85.

the present case the original Plaintiff supposed that she was entitled to take out administration to *Ann Collingwood*, and, according to the common practice, alleged that she had done so. She also had a beneficial interest, and before the hearing of the cause she discovered that she had no right to take out administration, but that the right was in another person. She had, before the bill was filed, received moneys, part of the debt due on the bonds, alleged to be due from the estate sought to be administered to the estate which she supposed that she represented. She never professed to be the administratrix of the estate to be administered in this suit; and she could not be made accountable in this suit, which distinguishes this case from *Griffith* v. *Vanheythuysen* (1). At the hearing she says that she is not administratrix, and desires to add the true personal representatives as co-Plaintiffs, and to insert apt words to shew the reason for adding them. If the Defendant wishes to dispute the facts stated in the amendments I think he ought to have an opportunity of doing so. But in my opinion there is nothing contrary to the practice in the first amendment adding the co-Plaintiffs. The second amendment, by which the interest of the original Plaintiff is shewn, is also disposed of on the same grounds. The third amendment complained of is also unobjectionable. The personal representative of the testator is really a Defendant, though she was not originally stated to be his representative. This amendment is not unreasonable, as it does not cause any disadvantage to the Defendant. It was also urged that the amendments, if allowed, would be useless, as no decree could be made in favour of the original Plaintiff. I think this objection has been already disposed of. There are no such antagonistic interests in the Plaintiffs as to prevent them from obtaining relief as co-Plaintiffs. I also think that the delay complained of by the Defendant is sufficiently explained by the difficulties which arose in the Court of Probate. The order, in my opinion, was entirely right. The Defendant may have time to file a voluntary answer, but he must pay the costs of the appeal motion.

Solicitors for the Appellant: Messrs. *Jennings & Son.*
Solicitors for the Plaintiff: Messrs. *Shum & Crossman*

(1) 9 Hare, 85.

L. J. R.
1867
Nov. 14.

In re INTERNATIONAL CONTRACT COMPANY.

LEVITA'S CASE.

Contributory—Acceptance of Shares—Allotment—Notice—Entry on Registry—Director.

L. applied for 1000 shares in a company, as trustee for *M.*; no letter of allotment was sent to *L.*, but his name was put upon the register in respect of those shares and advertised as a director; he attended a meeting of directors, and took no steps to have his name removed for two years:—

Held, that he was a contributory in respect of the 1000 shares.

Order of *Stuart*, V.C., affirmed.

IN the year 1864, Mr. *A. Levita*, of *Paris, docteur en droit*, was requested by Mr. *McHenry* to take shares in *McHenry's* name in the *International Contract Company, Limited, Levita* having previously been consulted professionally as to the legal position of the company. Accordingly, on the 4th of June, 1864, *Levita* signed and sent to the company an application for 1000 shares, in the following form:—

"To the directors of the *International Contract Company, Limited.*

"Gentlemen—Having paid to your bankers, the *Bank of London*, the sum of £1000, being a deposit of £1 per share on 1000 shares in the above company, I hereby request that you will allot me that number, and I agree to accept such shares or any less number you may allot to me, and I agree to pay the deposit on all allotments, and to sign the articles of association of the company when required; and I authorize you to insert my name in the register of members for the number of shares allotted to me."

At the same time, *Levita* sent a letter as follows:—

"I beg to inclose a form of application signed by me on behalf and in the interest of Mr. *James McHenry*, for 1000 shares of your company. Mr. *McHenry* is the owner of the shares in question, consequently I have nothing to claim, neither as dividend, nor for whatever other cause, in the 1000 shares myself."

Levita never paid £1 a share, or any other sum in respect of

the shares, but the £1 a share seemed to have been paid, probably by *McHenry*, and *Levita's* name was put on the register of shareholders in respect of the 1000 shares. No letter of allotment, or formal notice, was sent to *Levita*, but his name was advertised as a director, and on the 15th of September, 1864, he attended a board meeting of the directors and received a fee for so doing. He maintained that he attended in his professional capacity, but from the form of the receipt signed by him it was maintained on the other side, and held by the Court, that he received the money as a director's fee. A dividend was declared, but he received no notice thereof, and the amount was carried to the credit of *McHenry* in the company's books. In February, 1865, he wrote to resign his directorship, saying that he had never exercised the functions of director, but no further steps in the matter were taken until May, 1866, when he wrote again, begging the directors to accept his resignation, and denying that he had ever held a share in the company. In June, 1866, a call was made of £5 a share.

An order having been afterwards made for winding-up the company, *Levita's* name was placed on the list of contributories in respect of 1000 shares. He applied by summons to have his name struck out of the list, and the Vice-Chancellor *Stuart* refused the application with costs. *Levita* now moved, by way of appeal, that the order of the Vice-Chancellor might be discharged, and his name struck out.

Mr. *Greene*, Q.C., and Mr. *Haynes*, for the Appellant:—

Levita's application was never acceded to, and no shares were allotted to him, and no communication was ever addressed to him on the subject. He received no dividend, and had, in fact, nothing more to do with the shares. It does not appear that he was aware of his name having been placed on the register.

[*Tothill's Case* (1); *Ex parte Stock* (2); *Chapman's Case* (3); *Bloxam's Case* (4), and *Pellatt's Case* (5), were cited.]

(1) Law Rep. 1 Ch. 85.
(2) 33 L. J. (Ch.) 731.
(3) Law Rep. 2 Eq. 567.
(4) 33 Beav. 529; S. C. on app. 33 L. J. (Ch.) 574.
(5) Law Rep. 2 Ch. 527.

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Mr. *Bacon*, Q.C., and Mr. *J. Napier Higgins*, on the other side were not called upon.

SIR JOHN ROLT, L.J., said, that in this case there had been no letter of allotment, and no communication in reply to the application; but, on the other hand, there had been several circumstances tending to shew that the Appellant had become a shareholder. It had been said in argument that these circumstances were, each standing alone, unimportant, and that the addition of ciphers to ciphers would lead to no result, but in deciding questions of this class the addition of comparatively small circumstances might amount to sufficient evidence. *Levita* had applied for shares, his application had been acceded to, and he must be taken to have known that his name would be put upon the register of shareholders, with the important result that the world at large would have notice of the fact. Then there was the fact of his being a director, as to the effect of which his Lordship was bound to say that it was difficult to reconcile all the decisions on the subject, but in each case the decision depended on its own special facts.

The *Marquis of Abercorn's Case* (1) was very different: he had never applied for shares, but they had been allotted to him, and a fictitious loan entered by way of payment of deposit, and there was no proof that he ever acted, or intended to act, as a director. But here, *Levita* must have intended to become a shareholder from what he says in his formal letter of application. In the letter which he sent with it, though he said that he made no claim to dividends, he put himself in the position of applying for shares as trustee for *McHenry*. In this, as in the other cases, there must be evidence of a contract; there must be evidence of the application being acceded to; but there is no absolute necessity for evidence that the entire contract is in writing, as the parties may agree, or the application may be acceded to, without any letter or writing. The question is, whether the application was acceded to, and it is clear that the company acceded; in fact they were ready to accede to the request of *Levita* for 1000 shares before the application in writing was made, and his name was accordingly

(1) 10 W. R. 548; 8 Jur. (N.S.) 951.

put upon the register of shareholders. He must be taken, upon all the facts, to have been aware of this. He had been applied to in the month of May to transact some business for the company. Then in a month or two afterwards he was paid money for his attendance at a meeting of directors, and it was not possible to say that he received this money for professional services. He had applied for 1000 shares as a trustee who was not to receive any benefit in the shape of dividend for himself, but he had, in effect, asked to be placed on the register so as to make it public that he was a shareholder, and he must be taken to have known that the company had complied with his application, though the mere fact of his having attended as director might not of itself be sufficient.

Great reliance was placed upon the *dicta* in *Pellatt's Case* (1), but if read with the context they were seen not to be of universal application. In this case, though nothing was done in answer to the application for shares, yet, taking all these facts together, that *Levita* desired to be put upon the register, that he must have known that he was liable to be put upon it; that he attended, and was paid for attending, as a director; that he remained for a year or two without making any application to take his name off, His Lordship agreed in the conclusion to which the Vice-Chancellor came, and dismissed the application with costs.

Solicitors for the Appellant: Messrs. *Leman, Groves, & Leman.*
Solicitors for the Respondents: Messrs. *Lewis, Munns, & Co.*

(1) Law Rep. 2 Ch. 527.

L. J. R.
1867
Nov. 14, 15.

In re UNIVERSAL BANKING CORPORATION.

GUNN'S CASE.

Winding-up—Contributory—Acceptance of Shares—Application—Notice of Allotment—Entry on Registry.

Where a person applies for shares in a company, and shares are allotted to him, he will not be constituted a member of the company unless he has notice of the fact of the allotment. It is not, however, necessary that there should be a formal notice sent to him, if it appears that he was made aware that the company had accepted his application. The mere entry of his name on the register of shareholders is not sufficient for this purpose.

The decision of *Stuart*, V.C., affirmed.

Bloxam's Case (1), and *Cookney's Case* (2), distinguished.

THIS was an appeal from an order of Vice-Chancellor *Stuart* striking off the name of Mr. *W. Gunn* from the list of contributories of the *Universal Banking Corporation, Limited.*

The company was incorporated under the *Companies Act*, 1862. The prospectus, which was issued after the registration of the company, stated that application for shares was to be made in the accompanying form, together with the payment of the sum of £1 5*s.*, which would be returned on so many shares as were not allotted; and that the subscriber would receive in due course a certificate of the shares allotted, specifying the amount paid thereon.

The accompanying form of application was in the following terms:—"Having paid to you the sum of £ , as deposit of £1 5*s.* per share on shares in the *Universal Banking Corporation, Limited*, I hereby agree to accept such shares, or any less number that may be allotted to me, and to pay £1 5*s.* per share within one month from allotment, and all calls when due, and to sign the articles of association if required to do so."

The fifth of the articles of association was as follows:—"An application for shares in the company signed by or on behalf of the applicant, and followed by an allotment of any shares therein, shall be deemed to be an acceptance of such shares within the meaning of these articles, entitling the company to place the name

(1) 33 Beav. 529; 33 L. J. (Ch.) 574.

(2) 3 De G. & J. 170.

of the allottee on the register of shareholders in respect thereof; and every person who thus, or otherwise, accepts any share, and whose name is on the register of shareholders, shall, for the purposes of these articles, be deemed a shareholder."

Mr. *Gunn* deposed, that on the 14th of November, 1865, having seen the prospectus of the company, he applied to the manager for ten shares, and remitted £12 10*s.*; that he never received any certificate or notice of any allotment of shares, nor had been informed of any such allotment having been made; and that no demand had been made upon him for payment of the further sum of £1 5*s.* per share, as provided by the prospectus to be made within one month from the date of allotment. He also stated that, on the 14th of April, 1866, he wrote to the manager of the company as follows:—"Not having heard from you since I made application for ten shares in your bank, now will you kindly inform me when I may expect to hear when the shares are allotted." In reply to this he received a letter from the manager in these terms:—"In due course of post the matter of the allotment (1) of your shares shall be inquired into; and I will write you on the subject."

Mr. *Gunn* also stated that he heard nothing more of the bank until he saw a notice in the newspapers, announcing that a petition had been presented for winding up the company, in June, 1866, after which he wrote to ask for a return of the deposit.

In the minute book of the company appeared the following entry, on the 17th of November, 1865:—"Resolved, that ten shares be allotted to *Wm. Gunn*, Esq.;" and his name was entered in the register of shareholders, with the number of his shares, the date of entry being the 14th of November, 1865, which was the date of the application.

The Vice-Chancellor, under these circumstances, held that Mr. *Gunn* was not properly placed upon the list of contributories; and from this decision the official liquidator appealed.

Mr. *Greene*, Q.C., and Mr. *Brooksbank*, for the Appellant:—

All that is necessary to constitute a person a member of a com-

(1) This word was blotted in the original letter, and it was not clear whether the word was "allotment" or "non-allotment."

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pany is, that he should have agreed to take shares, and that his name should be entered on the register. This is the definition of a member in the *Companies Act*, 1862 (1). The application for shares, followed by the acceptance by the company, constitute a binding agreement. No doubt it is necessary, in the case of an ordinary contract, that the acceptance of the offer should be communicated to the person making it; but here the entry on the register was notice to the applicant. The register is intended for the benefit of creditors, and is notice to the whole world: *Companies Act*, 1862, sect. 37; and it was the duty of the applicant to inspect the register to see whether the allotment had been made. This is made still more clear by the words of the fifth of the articles of association, which amounts to an express authority to the company to place the applicant's name on the register. If a person were to apply to a tradesman, and offer to become his partner, and the tradesman were to write up his name over his door as his partner, that would be an acceptance of the offer which would bind the applicant: *Cookney's Case* (2); *Best's Case* (3); *Thompson's Case* (4); *Bloxam's Case* (5); *Hebb's Case* (6); *Oakes* v. *Turquand* (7); *Levita's Case* (8). It would be impossible for a company, in all cases, to prove that the applicant had received special notice of the allotment of shares. If they were bound to do so, a great inconvenience and hardship would result.

Mr. *Schomberg*, Q.C., and Mr. *N. R. Smart*, for the Respondent:—

Three things are necessary to make the contract complete under which a person becomes a shareholder in a company. He must apply for shares; the shares must be allotted him; and he must have notice of the allotment. We do not say that it is necessary that this notice should be formally given in writing, or otherwise, but the applicant must be proved to have knowledge of the fact of

(1) 25 & 26 Vict. c. 89, s. 23 (last clause):—"And every other person who has agreed to become a member of a company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company."

(2) 3 De G. & J. 170.
(3) 2 D. J. & S. 650.
(4) 13 W. R. 958.
(5) 33 Beav. 529; 33 L. J. (Ch.) 571.
(6) Law Rep. 4 Eq. 9.
(7) Ibid. 2 H. L. 325.
(8) Ibid. 3 Ch. 36.

the allotment. All the cases and dicta of the Judges may be reconciled upon this principle. In the present case Mr. *Gunn* distinctly negatives his having any knowledge of the allotment. Until the allotment had been communicated to him the directors might have revoked it; and he could not have enforced it against the company: *Pellatt's Case* (1); *Fletcher's Case* (before V.-C. *Wood*, Nov. 11, 1867); *Shackleford's Case* (2); *Mozley* v. *Tinkler* (3); *Routledge* v. *Grant* (4); *Kennedy* v. *Lee* (5).

Mr. *Greene*, in reply.

SIR JOHN ROLT, L.J.:—

I am of opinion that the decision appealed from is right, and that the appeal must be dismissed with costs. I was under that impression when the case for the Appellant was opened; but it was strenuously argued that all that was necessary to constitute a shareholder in a company was, that there should be an application for shares to the company, and that the applicant's name should be placed by the company on the register in pursuance of that application. And in support of that contention *Cookney's Case* (6), *Bloxam's Case* (7), and the recent case in the House of Lords, *Oakes* v. *Turquand* (8), especially the judgment of the Lords Justices in *Bloxam's Case*, were relied on. And it was said, that if anything inconsistent with the decision in *Bloxam's Case* was to be found in the observations of Lord *Cairns* in *Pellatt's Case*, those observations must be disregarded, and effect given to the principle that mere application and entering on the register of shareholders must be held sufficient.

I think that on principle, and without reference to the authorities, that proposition is not sound. I cannot agree that there is any fallacy in likening the contract between a company and a person who makes an application to become a member to an ordinary contract—the circumstances are different, but the principles are identical. There must be the consent of two parties to

(1) Law Rep. 2 Ch. 527.
(2) Ibid. 1 Ch. 567.
(3) 1 C. M. & R. 692.
(4) 4 Bing. 653.
(5) 3 Mer. 441.
(6) 3 De G. & J. 170;
(7) 33 Beav. 529; 33 L.J. (Ch.) 574,
(8) Law Rep. 2 H. L. 325.

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a contract; one man may make an offer to another, and say, "I agree to buy your estate;" but the person to whom he has made the offer must say, "I agree to sell you the estate," or he must do something equivalent to an acceptance, something which satisfies the Court, either by words or conduct, that the offer has been accepted to the knowledge of the person who made the offer. I think that is requisite in the case of an application for shares, just as in the case of any other contract. Of course there is a difference in the circumstances; there is not a register of contracts between mankind generally, at which the person who makes the offer can look to see if his offer is accepted; but the only difference that makes is, that you have not that circumstance, which may in some cases be important, to refer to in drawing the conclusion that the offer was accepted, and that the person who made it knew of its acceptance.

Suppose a person, as was suggested by Mr. *Greene* in his argument, had said to a tradesman, "I offer to become your partner," and the person to whom the offer was made wrote the name of the other over his door, without telling him he had done so, would that conclude the contract? Certainly not; it might, indeed, be a circumstance to be taken into consideration, but would not be sufficient in itself. So, here, the company might say, "We put you upon the register, and you might have looked at it." But that is only a circumstance to be considered, and would not conclude the matter.

Is there, then, anything in the authorities inconsistent with this view? I agree that *Bloxam's Case* (1), creates some difficulty, but to my mind it is clear, looking at all the reports in *Bloxam's Case*, and the comments that have been made upon it, that it was a case which depended on special circumstances, and that it did not determine the simple question. I think I am entitled so to deal with it. With respect to *Cookney's Case* (2), I think that may be put out of the way. *Cookney* authorized a director of the company to get him made a shareholder. The director, who was thus constituted *Cookney's* agent, did what was necessary to make him a shareholder. There was an agreement completed, not merely resting on the application for shares. The case of *Oakes* v. *Tur-*

(1) 33 Beav. 529; 33 L. J. (Ch.) 574.

(2) 3 De G. & J. 170.

quand (1) is of the same character. In that case there was an application for shares, and a letter in the ordinary form, in the fullest manner announcing the acceptance of the applicant's offer, and that he was a shareholder. Everything was complete, and therefore to draw a conclusion from that case that a mere application for shares, followed by placing the name on the register, is sufficient, is, I think, out of the question. Then, in *Pellatt's Case* (2), Lord *Cairns* says, clearly: "I think that where an individual applies for shares in a company, there being no obligation to let him have any, there must be a response by the company, otherwise there is no contract."

In deciding *Levita's Case* (3), yesterday, I did not take Lord *Cairns*, in *Pellatt's Case*, to have meant that there must be a response in writing, but that what he meant was this—there must be, in writing, or verbally, or by conduct, something to shew the applicant that there was a response by the company to his offer. There was enough to satisfy me that *Levita* knew that the company had assented to his request, and had treated him as a shareholder accordingly, and had placed him on the register.

What are the facts in the present case? *Gunn* applies in writing for shares, he applies after he has received a prospectus, which announced that the present payment on shares was to be £2 10*s.* per share, namely, £1 5*s.* on application, and £1 5*s.* within a month from the date of allotment. On the 14th of November, 1865, *Gunn* made his application for ten shares, and paid his £1 5*s.* on each share, and this is quite in the ordinary course. On the same date it appears in the books of the company that there was an allotment of ten shares made to him, and he was put on the register for that number of shares. But there still remained the other £1 5*s.* that was to be paid within a month of the allotment. It is clear that the company never applied for that sum. It was argued that it would be difficult for the company to prove that they had applied for the £1 5*s.*, if the onus of proof was on them in each case. But I think it is clear, on the evidence, that in this case they did not apply to *Gunn*, and that it must be so taken.

(1) Law Rep. 2 H. L. 325. (2) Law Rep. 2 Ch. 527.
(3) Law Rep. 3 Ch. 36.

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This was all that took place until the 14th of April, 1866, when *Gunn* writes to the manager: "Not having heard from you since I made application for ten shares in your bank"—shewing that at that time he thought the matter still open. What is the answer? "The matter of the allotment" (or "non-allotment," it does not seem to me to signify which) "of your shares in this bank shall be inquired into, and I will write you on the subject." Surely it will not be possible for the company to say that that was an allotment. He treats it as a matter for inquiry; up to that time there was nothing binding *Gunn*. Then the company allow two months to elapse after this inquiry before they do anything, and then the company is wound up, and in August, 1866, there comes another letter from *Gunn*, who writes: "Will you have the kindness to acquaint me whether I can have a return of the deposit?"

I think it is impossible, under these circumstances, to hold that the application for these shares was accepted, or any contract made, or that any knowledge of the registration was given to *Gunn*. I do not think it was his duty to search the register. Therefore, though governed by the decision of the House of Lords, that the creditors shall, as the general rule, have the benefit of the register, and of the names on the register, there is, in my opinion, nothing in this case to warrant me in saying that there would be any wrong done to creditors in omitting *Gunn's* name from the register. I must, therefore, dismiss the appeal, with costs.

Solicitor for the Appellant: Mr. *Pulbrook*.
Solicitor for the Respondent: Mr. *Sealy*.

COOPER *v.* MARTIN.

L. JJ.
1867
Nov. 12, 13, 18, 25.

Power—Defective Execution, when aided in Equity—Power to appoint by Deed within a prescribed Period—Appointment by Will—Will speaking from Death—Power to appoint Proceeds of Sale—Appointment of Estate in Specie.

A testator gave an estate upon trust for sale, with power of pre-emption to his younger children, and the proceeds were to be held upon such trusts as his widow, by deed or instrument sealed and delivered before the youngest child attained the age of twenty-five years, should appoint, and in default for his children, except the eldest son, equally. The testator's widow, by deed-poll executed within the prescribed period, appointed the proceeds of the estate among all the children equally; but reserved a power of revocation. By her will, which was also executed before the youngest child attained twenty-five, but came into operation by her death after the prescribed period, she appointed the estate by name to the eldest son:—

Held, that the will, having come into operation after the prescribed period, could not take effect as a new appointment under the power; and that this was not such a defective execution as would be relieved against in equity.

Per LORD CAIRNS, L.J. (differing from *Stuart*, V.C.), that if the appointment had been in other respects good, the proceeds of the sale of the estate would have passed under the appointment of the estate.

THIS was an appeal from a decision of Vice-Chancellor *Stuart*, made in a suit instituted for the administration of the estate of *William Henry Cooper*.

Several questions were argued in the suit, but the only point requiring a report related to an estate called *Pain's Hill*, devised by *W. H. Cooper's* will.

The testator, by his will, dated the 30th of May, 1840, devised (among other things) the estate called *Pain's Hill*, in the county of *Surrey*, to three trustees in trust for his wife, *Harriett Cooper*, during her life, and from and after her decease upon such trusts, and for such intents and purposes, and subject to such provisions and declarations as were thereinafter by him expressed and declared concerning the residue of his real and personal estate. And, after giving his trustees power to sell the *Pain's Hill* estate during the lifetime of his wife, if she declined to reside in the mansion on that estate, the testator directed that all the residue of his real and personal estate should be held in trust that the said

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trustees should raise a sum of £70,000 consols, and should hold that fund, and also certain ground rents of houses in the *Regent's Park*, upon trust to pay the interest and rents to his wife during her life, and after her decease to pay and transfer the said trust fund and rents to the testator's children or remoter issue (such remoter issue to be born before such appointment as thereinafter mentioned should be made to them respectively), in such manner and in such shares as his said wife should, "by deed or instrument in writing, or by will," appoint; and, in default of such appointment, to the said testator's children living at his death, except the eldest son, *William Henry*, equally, to be vested in such children at the age of twenty-five years; and, in default of such children, the said sum of £70,000 consols and the rents were, subject to a general testamentary power in the widow, to fall into the residue. And, after directing the trustees to raise a further sum of £40,000 consols, and declaring the trusts thereof, the testator directed the trustees to convert the remainder of his residuary personal estate, and, after making provision for the maintenance of his younger children till they should attain twenty-five years, to accumulate the surplus till the youngest child should attain that age. And he directed that the trustees should, as soon as each and every of his younger children should have attained the age of twenty-five years, or have died under that age leaving issue, sell the real estates, with a power of pre-emption over any part of it to his two youngest sons, *Rowland Edward* and *Frederick John*, according to their seniority. And he declared that the proceeds of the sale, and the residue of his personal estate, should be held in trust for all or any one or more of his children, grandchildren, and issue, such grandchildren and issue respectively to be born before any such appointment as thereinafter mentioned should be made to them respectively, in such manner and in such shares, and either by way of present or remoter interest, or otherwise, and to vest and be payable and paid upon such contingencies, and at such time or times, as his said wife, notwithstanding her coverture by any future husband, at any time or times, and from time to time, "before each and every of my said children shall have attained the age of twenty-five years, or have died under that age, by any deed or instrument in writing, to be sealed and delivered by my said wife" in the presence

of two or more credible witnesses, and to be attested by the same witnesses, should either absolutely, or with power of revocation and new appointment, such new appointment to be in favour of some one or more of the objects of this present provision, direct, limit, or appoint; and in default in trust for the younger children equally.

The testator died in September, 1840, leaving his three sons mentioned in the will, and no other children, surviving. *Pain's Hill* remained unsold till the institution of the suit.

On the 5th of April, 1841, *Harriett Cooper*, the widow, executed a deed-poll, whereby, after reciting the greater part of her husband's will, she appointed that the trustees should transfer the money arising from the sale of the said testator's real estates, and the rents, issues, and profits in the meantime, and all the said trust funds and accumulations, and all other his personal property (if any), upon certain trusts for securing certain sums to be paid to her sons; and as to all the rest, residue, and remainder of the aforesaid general residuary fund, to or in trust for her three sons equally, upon their attaining the age of twenty-one years. And, by the same deed-poll, she reserved a power of revocation and new appointment by any deed or instrument in writing to be sealed and delivered by her in the presence of two witnesses.

On the 10th of April, 1841, Mrs. *Cooper* made a will, whereby she gave and appointed *Pain's Hill* estate by name to her eldest son, *William Henry*, absolutely; and by a codicil, dated the 1st of December, 1852, she confirmed that appointment. The youngest son attained his age of twenty-five in 1851, and Mrs. *Cooper* died in 1863.

By certain deeds-poll subsequent to the date of her will, the testatrix had in terms revoked her previous appointments as to part of the property (other than *Pain's Hill*) and made new appointments thereof.

The suit was instituted by the infant children of *Rowland Edward*, the second son, for the administration of the estate; and the question arose, whether the *Pain's Hill* estate was well appointed, by Mrs. *Cooper's* will, to the eldest son, *William Henry Cooper*; or whether the estate, or the proceeds of the sale thereof, passed, under the appointment of the 5th of April, 1841, to the three sons equally.

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The Vice-Chancellor was of opinion that the estate was well appointed by the deed-poll among the three children; and that the power of revocation and new appointment reserved by the deed-poll was not well exercised by the will of the 10th of April, 1841 (1). From this decision, *W. H. Cooper*, the eldest son, appealed.

(1) The judgment of the Vice-Chancellor was as follows:

1866. June 20. SIR JOHN STUART, V.C.:—

At the close of the argument I adverted to some of the established principles of the law as to trusts for the conversion of real or personal estate, and also to certain unquestionable propositions as to the doctrine of election as applied to trusts for conversion.

These principles, so well established, seemed to me irreconcilable with the notion that the will of Mrs. *Cooper* could be held to be a valid appointment of the *Pain's Hill* estate. In support of the appointment the intention to execute the power was relied upon; and the authority of the cases in which the Court has aided a defective execution, and has considered an execution by will sufficient, although the power mentions only an execution by deed. On the other side, the intention of the testator who created the power was relied on, and the great argument was, that the time which he had limited within which the power must be executed, that is before each and every of the children should have attained the age of twenty-five, together with the context, shewed that an execution of the power by will or other revocable instrument must be invalid, as contrary to the intention of the testator.

Where each party has thus made his case depend upon intentions there is no doubt that an intention clearly manifested by the donor of the power must prevail over any contrary intention of the person to whom the power is given. But the argument that the limitation of the time shews an intention that the appointment, to be valid, must have its complete irrevocable effect within the time limited, and could not be revoked after that time was past, is, perhaps, not conclusive or satisfactory.

The power expressly authorizes an appointment which reserves a power of revocation and new appointment. If an appointment of the proper subject-matter of the power had been made by deed on the very last day of the limited period, on what ground can it be said with certainty that the reservation authorized by the power vitiated the appointment? or that, as a mere power of revocation, it could not be increased after the period limited for appointment? It is not enough to say that a mere revocation is a new appointment, for it is not. When it is said that the testator intended that the share of each child, grandchild, or other issue, should be irrevocably ascertained within the limited period, that is a mere inference from the limitation of the time, and is not expressly directed by the testator.

In the case of *Piper* v. *Piper* (3 My. & K. 159) it was expressly declared that the share of each child must vest irrevocably within the limited period. Whatever may be the correct view as to these matters, nothing seems more clear than the testator's direction that *Pain's Hill* should be sold, and that the proceeds of the sale should form part of the general residue of his personal estate, over which general residue as personal estate, and over

Sir *Roundell Palmer*, Q.C., Mr. *G. M. Giffard*, Q.C., and Mr. *H. F. Bristowe*, for the Appellant:—

Admitting that the deed-poll contained a valid appointment of nothing else, the power of appointment is given. Nor does anything seem more clear than the testator's intention that the eldest son should not take or enjoy the *Pain's Hill* estate. This is manifest from the absolute and imperative trust to sell it, and also from the exclusion of the eldest son from the right of pre-emption.

These are circumstances which seem fatal to the validity of an appointment of the *Pain's Hill* estate to the eldest son in its unconverted state. No solid ground appears for the argument that because an appointment of so much of the general converted residue as should be produced by the sale of the *Pain's Hill* estate might be valid, therefore an appointment of the *Pain's Hill* estate itself in its unconverted state must be good also, so as to defeat *pro tanto* the trust for conversion, and the right of pre-emption. Nor is there any solid ground for the extraordinary admission that if the appointment of the estate in specie had been made by deed and not by will, it would have been valid, although it defeated *pro tanto* the trust for conversion and the right of pre-emption. This is plain enough when it is considered that an appointment of so much money as *Pain's Hill* would produce by sale, assumes a conversion, and would be imperative without conversion. There is no coherence in the argument that because an appointment consistent with the trust for conversion is good, therefore an appointment which is inconsistent with that trust must be good also.

Under the most imperative trust to convert, the person who takes an absolute interest in the converted property has a right of election to take it in its unconverted state. But the owner of a partial interest, or of any interest less than the absolute interest, has no right of election. And the mere donee of a power has no right whatever to elect to give the property which is the subject of the power in any other state as to conversion or nonconversion than the donor of the power has given it. In the case of *Bullock* v. *Fladgate* (1 V. & B. 471) the apportionment of the estate directed to be sold was held to be good because there was no other person who had an interest in converting the estate into money, and because the conversion could not take place without the consent of the donee of the power, who had therefore an express right to elect that it should not be sold. That decision, so far from helping to shew that Mrs. *Cooper's* will can be a good appointment, is decided on principles quite inconsistent with its validity.

The deed of the 5th of April, 1841, is a complete appointment of the whole residuary estate as personalty, and after appointing certain sums of money to each of the three sons, it appoints the whole residuary estate as personalty among the three sons. This deed of appointment reserves a power of revocation. Unless under this power of revocation, Mrs. *Cooper's* will could have no effect whatever as an appointment. But her will makes no mention whatever of this previous appointment, and has no recitals or mention of any intention to exercise the power of revocation and new appointment. Her will seems to have been made under a

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the estate to the three sons, we contend that the appointment was revoked and the estate re-appointed to the eldest son by the will. There is no force in the argument that power to appoint the proceeds of the sale of an estate is not well exercised by an appointment of the estate itself. The appointment is made, of course, subject to the trust for sale, and to the right of pre-emption in the younger children; and the appointee was entitled to elect to take the estate as realty, subject to the right of pre-emption: *Bullock* v. *Fladgate* (1); *Emuss* v. *Smith* (2); *Wall* v. *Bright* (3); *Pearson* v. *Lane* (4); *Adams* v. *Austen* (5).

It is objected that the power could only be exercised by a deed sealed and delivered; but a Court of equity will relieve against such a defect in the execution of a power in favour of children: *Sugden* on Powers (6); *Tollet* v. *Tollet* (7); *Wilkes* v. *Holmes* (8); *Chapman* v. *Gibson* (9); *Morse* v. *Martin* (10).

It is also objected that the power must be executed before the youngest child attained the age of twenty-five; and it is said that the will did not come into operation till after that event. We contend, in the first place, that this restriction does not apply to the *Pain's Hill* estate, but only to the residue. The testator wished his children to come into their shares of the residue at the age of twenty-five; but that did not apply to *Pain's Hill*, which was given to the widow during her life. But, secondly,

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total forgetfulness or ignorance of this previous appointment, and is inconsistent with it, and therefore invalid. It is, therefore, absurd to say that this will can be brought within the equitable doctrine which, on the ground of intention, gives an effect to an appointment by will of a power which in its terms requires an execution by deed. Moreover, the various appointments by deed subsequent to the date of the will are expressly executed in exercise of the power of revocation reserved by the appointment of the 5th of April, 1841. They all recite the various previous appointments before and after the date of the will, and they make no mention of the will, and would operate as a constructive revocation of the will, even if it had any effect as an appointment. There is, therefore, no ground for saying that the will is a valid appointment.

(1) 1 V. & B. 471.
(2) 2 De G. & Sm. 722.
(3) 1 Jac. & W. 494.
(4) 17 Ves. 101.
(5) 3 Russ. 461.
(6) 6th Ed. vol. ii. p. 100.
(7) 2 P. Wms. 490.
(8) 9 Mod. 485.
(9) 3 Bro. C. C. 229.
(10) 34 Beav. 500.

we say that the power was executed before the prescribed period. The limitation applies to the execution of the instrument, not to the time of its coming into operation. The donee having executed the power within the time, had express power to reserve a power of revocation. There was no limit of time to the execution of this power of revocation, and the power of revocation implies a power of new appointment: *Saunders* v. *Evans* (1). It is not, however, necessary to rely on this, for the will was itself executed within the prescribed period, and for this purpose the will speaks from its date: *Bullock* v. *Bennett* (2). [They also referred to *Carver* v. *Richards* (3); *Bailey* v. *Lloyd* (4); *Freeland* v. *Pearson* (5); *Sutherland* v. *Northmore* (6).]

Mr. *Bacon*, Q.C., and Mr. *Rawlinson*, for the Plaintiffs:—

The proceeds of *Pain's Hill* estate were well appointed by the deed-poll of the 5th of April, 1841; and that appointment was not affected by the subsequent will. For, in the first place, Mrs. *Cooper* had no power to appoint *Pain's Hill in specie*. The disposition of *Pain's Hill* is different from that of the rest of the property. It was the intention of the testator that, at all events, it should be sold, and that his widow should only dispose of the proceeds of the sale.

Secondly: There is no reference to the power of revocation and new appointment in the will. The testatrix was only affecting to dispose of her absolute property. The will was made in entire forgetfulness of the power given to her by her husband's will: *Pomfret* v. *Perring* (7).

Thirdly: The will was not an instrument sealed and delivered within the terms of the power; and no appointment made by it could be valid, because it came into operation after the youngest child attained twenty-five. This is not such a defect as a Court of equity will relieve against. It is of the essence of the power. The testator wished the shares to be fixed and certain, and that his children should know their interests before they attained twenty-five;

(1) 8 H. L. C. 721, 7 Jur. N.S. 1293.
(2) 7 D. M. & G. 283, 4 Jur. N.S. 567.
(3) 27 Beav. 488. 5 Jur. N.S. 1413.
(4) 5 Russ. 330.
(5) Law Rep. 3 Eq. 658.
(6) 1 Dick. 56.
(7) 5 D. M. & G. 775. 1 Jur. N.S. 173.

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and this could not be done if the appointment were by will—at all events, unless the will came into operation before the prescribed period.

We also rely upon the fact, that the will was republished by the codicil of the 1st of December, 1852, and must be considered to have been executed on the date of the codicil. If, therefore, the appointment is to be held to have taken effect at the time of its execution, it was still too late: 1 Vict. c. 26, s. 34.

Mr. *Shapter*, Q.C., and Mr. *J. Napier Higgins*, for Mrs. *Worthington*, a sister of the Plaintiffs, and her husband, maintained that there was no appointment of *Pain's Hill* in the deed-poll of the 5th of April, 1841. The intention of the widow was only to exercise her power of appointment over the residue, not over the proceeds of *Pain's Hill*, which did not fall into the residue, although it was given on similar trusts: *Francis* v. *Collier* (1).

Mr. *Greene*, Q.C., and Mr. *Springall Thompson*, for *Frederick John Cooper*, the youngest son of the testator.

Mr. *Cole*, Q.C., Mr. *F. H. Bacon*, and Mr. *Jolliffe*, for trustees.

Mr. *Giffard*, in reply.

Nov. 25. LORD CAIRNS, L.J.:—

The decree of the Vice-Chancellor of the 23rd of June, 1866, has declared that the proceeds of the sale of the *Pain's Hill* estate were, by the deed of the 5th of April, 1841, well appointed, and are now divisible equally between the three sons of the testator, *William Henry*, *Rowland Edward*, and *Frederick John*, and it is of this part of the decree that the Appellant, *William Henry Cooper*, in the first place, complains. He contends that this deed was, as to *Pain's Hill*, revoked by a subsequent will, dated the 10th of April, 1841, made by the donee of the power (the widow of the testator), and that this will was a valid execution of the power, and gave the estate of *Pain's Hill*, or its proceeds, to the Appellant exclusively.

(1) 4 Russ. 331.

The estate of *Pain's Hill* was devised by the testator in trust for Mrs. *Cooper*, the widow, for her life, and afterwards on the same trusts as the residue of his real and personal estate. These trusts were trusts to sell as soon as the youngest child should attain twenty-five, with a certain power of pre-emption in the two younger sons; and the moneys arising from the sale were to be in trust for the testator's children, and certain remoter issue, either by way of present or remoter interest, or otherwise, as his wife at any time or times before each and every of his children should have attained the age of twenty-five years, by any deed or instrument in writing, to be sealed and delivered in the presence of two or more credible witnesses, and to be attested by the same witnesses, and either absolutely or with power of revocation and new appointment, such new appointment to be in favour of one or more of the objects of the power, direct, limit, or appoint, and in default of appointment, for the younger children equally.

It is admitted by all parties, except the Defendants represented by Mr. *Shapter*, that the deed of the 5th of April, 1841, was a valid and formal execution by the widow of this power, as regards the proceeds of the sale of *Pain's Hill* estate, appointing, under the general words used in the deed, those proceeds to the three sons equally, and reserving a power of revocation. Mr. *Shapter* contended that the deed of the 5th of April, 1841, was not intended to operate as an appointment over the proceeds of any real estate of the testator, except such real estate as was strictly residuary real estate, excluding *Pain's Hill*. It would be difficult to suggest any reason why *Pain's Hill* should have been excluded, and, in my opinion, the words referring to and the words executing the power, are amply sufficient to take in the proceeds of sale of every part of the real estate of the testator, whether properly residuary, or devised to go on trusts corresponding with the residue.

The widow afterwards, by her will, dated the 10th of April, 1841, gave and appointed the *Pain's Hill* estate by name to *W. H. Cooper* alone. The youngest son, *Frederick John*, attained his age of twenty-five in 1851, and the widow survived this date, and died in 1863.

For the purpose of expressing the opinion I have formed on the case I may assume, although I do not mean to decide, that the

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instrument of the 10th of April, 1841, although testamentary, ought in a Court of equity to be held to be, as regards form, a sufficient execution of the power in favour of the Appellant; and I should have had no doubt, speaking with great respect of the contrary view which the Vice-Chancellor appears to have entertained, that the appointment of *Pain's Hill, eo nomine,* in the will would have been a revocation *pro tanto* of the appointment in the deed of the 5th of April previous, and would have carried the proceeds of the sale of *Pain's Hill* if, under the trust for pre-emption by the younger brothers or otherwise, it should become necessary to sell it. The difficulty in the way of the Appellant appears to me to be of a different, but a more serious character.

The power given to the widow was to be exercised by her before the youngest son attained twenty-five. The reason for this appears obvious on the face of the will. The residuary personal estate was to be distributed at the time, and although the life estate of the widow in *Pain's Hill* might as to it postpone the sale and distribution to a later period, it was clearly in the highest degree desirable that at the period when the residuary estate should become divisible the children of the testator should know definitely what were their vested and transmissible rights in all his property. The time within which an appointment was to be made by the widow was therefore, in my opinion, not a matter of form, but of the substance and essence of the power.

The will of the widow of the 10th of April, 1841, was dated and signed within the prescribed period, but it had not within that period any effect whatever. It could not, from its nature, be otherwise than revocable. It conferred no interest, and on the day when the youngest son attained twenty-five the interests appointed by the deed of the 5th of April, 1841, in the proceeds of the *Pain's Hill* estate remained vested and undisturbed in the appointees under the deed. It might have been otherwise had the widow died before the youngest son attained twenty-five, but in the events which happened it cannot, in my opinion, be said that any appointment was made within the prescribed period. A devise to *A.* for life, with remainder to such uses in favour of any issue of *A.* as the youngest son of *A.* shall within twenty-one years after the death of *A.* appoint by deed or will, would not, I apprehend, be safe

from the operation of the law against perpetuities, unless the deed or will of the donee of the power come into irrevocable operation within the twenty-one years. I, therefore, am of opinion, arriving at the same result as the Vice-Chancellor, though on different grounds, that the will of the 10th of April, 1841, does not operate as an execution of the power, and that the decree as to the proceeds of the *Pain's Hill* estate is correct.

SIR JOHN ROLT, L.J.:—

The Appellant (the eldest son of the testator) contends that *Pain's Hill* is well appointed to him exclusively by his mother's will. The Vice-Chancellor held it to be clear that the testator intended that *Pain's Hill* should be sold, and that the proceeds of sale should form part of the general residue of his personal estate, over which general residue, and over nothing else, the power of appointment was given, and that these circumstances were fatal to the validity of an appointment of *Pain's Hill* in its uninvested state. The Appellant's counsel controverted this conclusion, and cited several authorities in support of this appeal, but I do not think it necessary to consider them, as I am of opinion that, whatever may be their force, the Vice-Chancellor's decree as to *Pain's Hill* is, on another ground, certainly right.

There can be no doubt of the general rule, that in favour of an object of the power, who is a son of the donee, a Court of equity will supply the defect where the power which ought to have been executed by deed has been exercised by will, if there is nothing in the instrument creating the power to mark the testator's intention on the subject, beyond the fact that he has pointed to a deed as the mode of executing the power. So far, the Appellant's contention is not disputed. But the decisions which have thus settled this question have not, I apprehend, determined that it is not competent to a settlor to make the nature and character of the instrument by which the power he creates shall be executed of the essence of the power, without observing which no execution of his power shall be valid. They have all, as I understand them, recognised the principle that anything material to the intention of the donee of the power may not be defeated, and have proceeded (perhaps somewhat singularly) on the opinion, that to a donor who had

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merely given a direction that his power should be executed by deed it was immaterial whether it was executed by deed or will. But it is not, I apprehend, to be doubted that equity in these cases, as well as in others, will never uphold an act which will defeat what the person creating the power has declared, by expression or necessary implication, to be a material part of his intention. Now, was it not a material part of the testator's intention, as declared in this case, that the power should be exercised, as he has said, by deed or sealed instrument in writing, and not by will? In the same will, in creating a power over other subjects, the £70,000 and the *Regent's Park* ground rents, the testator has said that it might be exercised by deed or instrument in writing (omitting here the word "sealed") or by will; and again, if there should be no children, the general power given to the widow over the same properties was to be exercised by will only. Why these distinctions? It could not have been accidental, the proviso also that the power should be exercised before the youngest child attained twenty-five pointing in the same direction. On the whole of the will, it appears to me plain that the distinction was adopted because the testator thought it material that the power over the *Pain's Hill* estate, and over the residue, should not be exercised either by will or by an unsealed instrument. But, suppose this to be insufficient to take the case out of the general rule, there then arises the difficulty, from the circumstance that the testator's widow, whose will is said to have been an execution of the power, survived that period at which the youngest of the testator's children attained twenty-five. It was contended for the Appellant that this proviso was obviously introduced because of the direction to accumulate the residue till the youngest child should attain twenty-five, at which time, and not before, there was to be a distribution of the residue, and that this reason did not necessarily apply to *Pain's Hill*, of which the widow was tenant for life, and of which there might be no distribution, therefore, till after the youngest child attained twenty-five; but as the testator has not, in this respect, drawn any distinctions between *Pain's Hill* and the other property subjected to the same power, I think it impossible for the Court to make any such distinction, especially as the widow might have died before the youngest child attained twenty-five, in which

case I apprehend the direction to accumulate till that period would have applied to *Pain's Hill* as well as the other property.

It was then said that the introduction of a power of revocation was innocuous if not exercised; that if the power had been, in fact, executed by deed in due time, reserving a power of revocation at any time during the donee's life, the appointment would have been good if not actually revoked before the youngest child attained twenty-five, even though the widow had survived that period. I am not satisfied that this contention is sound; but it is unnecessary to consider it, because in the case supposed the deed would have operated as an execution of the power, subject to revocation, from the moment of the execution of the deed, and before the youngest child attained twenty-five, as declared by testator. Not so, in my opinion, the execution of the power by will. The will would not operate as any such execution till the widow's death. It is nothing that the will bears date within the time. It was intended to be ambulatory, and the law must assume that the donee of the power did not intend that it should operate as an execution of the power till her death. True, if the power had been executed by deed before the youngest child attained twenty-five, with such a power of revocation as that above suggested, the fact of such execution might not have been disclosed or known to the appointee till the widow's death. But the deed, if operative as the execution of the power at all, would, in the case supposed, notwithstanding this want of knowledge, have been not only signed and sealed, but would have been an execution of the power before the prescribed period; and so it would if such an appointment had been made to the eldest son by deed, provided he should survive his mother. In every way of looking at it, the distinction between a deed which speaks from the moment of execution and the will which speaks from the death is marked and substantial, and the latter cannot, I think, be held to be an exercise of the power before the youngest child attained twenty-five, within the terms of the testator's will. I do not, therefore, think it necessary to rely on the confirmation of the will by a codicil executed after the youngest child had attained twenty-five, though the circumstance is not unimportant.

I am further of opinion that the *Pain's Hill* property not being

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affected by the will of the testator's widow, was well appointed by the deed of the 5th of April, 1841. Mr. *Shapter*, who alone disputed this, admitted that the widow had, by the deed, sufficiently referred to her power over *Pain's Hill* to support an appointment of it if she had, in fact, sufficiently described the property in the operative part of the deed; but he contended that the appointment by her of "the rest and residue of the aforesaid general residuary fund" to the three children equally did not include *Pain's Hill*. This, I think, is too narrow a construction. In the operative part of the deed the widow begins by appointing that the trustees should deal with the moneys arising from the sale of the testator's "said" real estate, and all his personal property and effects, first as to certain specific sums on certain trusts therein mentioned; and the words "rest, residue, and remainder of the aforesaid general residuary fund" must include the residue of all the real estates and property comprised in the first operative words, and those words, I cannot doubt, include the *Pain's Hill* property, the disposition of which by the testator is included in the recitals of the deed. I think, therefore, the order appealed from, so far as it declares that the proceeds of the sale of the *Pain's Hill* property were well appointed by the widow by the deed-poll of the 5th of April, 1841, and that such appointment was never revoked by her, is right.

Solicitors for the Plaintiffs: Messrs. *Simpson & Dimond.*

Solicitors for the Defendants: Messrs. *White, Broughton, & White;* Messrs. *Burgoyne, Milnes, & Burgoyne;* Mr. *Hubbard.*

TILLEY *v.* THOMAS.

L. JJ.
1867
Nov. 4, 5, 11.

Specific Performance—Vendor and Purchaser—Meaning of word "Possession"—Time of the Essence of the Contract.

Where a contract for purchase provides that possession shall be given by a certain day, the word "possession" must be understood to mean possession with a good title shewn. This construction is the same in equity as at law, although a Court of equity will consider time not to be of the essence of the contract, and will relieve against a breach of performance at the date assigned, unless there is something in the contract, the nature of the property, or the circumstances, which renders it inequitable for the Court to interfere.

A person agreed to purchase a leasehold house for his own residence, and contracted that he should have possession by a certain day; but the vendor, although he tendered possession, failed to shew a good title by the day named:—

Held (reversing the decision of *Stuart*, V.C.), that the stipulation as to time was of the essence of the contract, and bill for specific performance of the agreement dismissed.

Post 308
— 343.
2 Pr. 142
10 Eq 285
16 BD. 18
— 411

THIS was an appeal from a decision of Vice-Chancellor *Stuart*.

The Plaintiff, *James John Tilley*, was the owner of a leasehold dwelling-house and premises at *Fulham*, held under a lease for a term of forty-nine years, from Michaelmas, 1834.

On the 14th of December, 1864, the Plaintiff agreed to sell the premises to the Defendant, *Charles Thomas*, for £700. The agreement was in the following terms:—

"*London*, 14th December, 1864.

"I hereby agree to purchase the lease of *Cambridge Lodge, North End, Fulham*, for the sum of £700, to include house, fixtures and fittings of outbuildings adjoining thereto, and garden stock in ground. Possession to be given on the 14th January next."

At the same time the Defendant paid the auctioneers, Messrs. *Kingston & Elstob*, a deposit of £70, and received a receipt in the following form:—

"Received of *C. Thomas*, Esq., the sum of £70, by cheque, being the deposit on the sum of £700 agreed to be paid by him for the lease of *Cambridge Lodge, North End, Fulham*, to be re-

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turned in the event of the sale not being completed through the vendor's fault."

On the 23rd of December the Plaintiff delivered an abstract of his title, but difficulties arose in the production of the lessor's title, which were not cleared up before the 14th of January, 1865. On that day the Plaintiff offered to deliver up possession of the house and premises to the Defendant, but he refused to accept possession on the ground that the Plaintiff had not shewn a complete title. On the 5th of June, 1865, the Plaintiff filed his bill for specific performance of the contract, alleging that he had, since the 14th of January, deduced a good title to the premises.

The Defendant, in his answer, stated that his object in agreeing to purchase the house was to occupy it as a residence, and that he wanted immediate possession in order to prepare it for that purpose, and he insisted that he was entitled to possession under a good title, and not to actual possession only, on the 14th of January. The third paragraph of the answer was as follows:—

"At the time when I entered into the said agreement I had recently concluded an arrangement with the *Clergy Club and Hotel Company, Limited,* for the sale to them of my lease of *Thomas's Hotel,* in which I was then residing. Extensive repairs and alterations were required to make the hotel suitable for a club, and I was compelled to find another residence within a very short period. I was principally induced to enter into the said agreement for the purchase of *Cambridge Lodge* by the statements of the Plaintiff, and the said *J. A. Elstob,* that the purchase should be completed, and that I should be let into possession, within a month, so that I might make any alterations which I thought desirable in the grounds and gardens, and might furnish the house throughout before quitting the hotel. I distinctly informed the Plaintiff and the said *J. A. Elstob* that it was my intention to make such alterations, and to furnish the house as aforesaid, and I understood from them that the meaning and effect of the agreement which I had signed, and the receipt which had been given to me (such agreement and receipt being both in the handwriting of the said *J. A. Elstob,* and written at the same time, and as part of the same transaction), was that possession of *Cambridge Lodge* was to be

given to me, and the sale completed, on the 14th of January, 1865, and that if through the vendor's fault the sale was not completed and possession given to me on that day, the deposit was to be returned."

In reply to this the Plaintiff and *J. A. Elstob,* in the joint affidavit filed by them, said:—"We have read the third paragraph of the answer of the above-named Defendant *Charles Thomas,* filed in this cause, and we admit it to be true, as therein stated, that the said Defendant informed us that he wished to have possession given to him of the house and grounds of *Cambridge Lodge* by the 14th day of January, 1865, in order that he might make any alterations which he might think desirable in the grounds and gardens, and that he might furnish the house, but we positively deny that any mention whatever was made, either by the said Defendant, or by us, or by either of us, either before or after the signing of the said agreement therein mentioned, that the purchase should be completed on the said 14th day of January, 1865, or at any other time, nor was any allusion whatever made by the said Defendant, or either of us, as to the completion of the purchase at the time stated in the said paragraph, nor at any other time, nor was anything said by either of us, or the said Defendant, which could possibly induce or lead the said Defendant to suppose that by naming the 14th day of January, 1865, as the day upon which possession of the said premises should be given up to him, it was also intended that on or before that date the purchase should be completed as stated in the said paragraph of the said Defendant's answer; nor did we then suppose, nor believe, that the said Defendant then supposed or understood that the sale was to be completed on the said 14th day of January 1865, as well as possession of the premises given to him on that day, but, on the contrary, that the said 14th day of January, 1865, was specially fixed as the day upon which possession only of the said premises should be given to the said Defendant."

On the 24th of December the Plaintiff's solicitor, Mr. *Overbury,* delivered an abstract of the title to Mr. *Cameron,* the Defendant's solicitor, and an appointment was made for the 27th to examine the deeds. *Cameron* and his clerk attended accord-

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ingly, and saw a clerk of *Overbury*, who stated that the deeds were not in the possession of *Overbury*, and that he had gone to the Plaintiff's house for them; and it was arranged that *Overbury* should write and make an appointment for their examination.

On the 3rd of January, 1865, *Cameron* wrote to *Overbury* to remind him that they were waiting for an appointment; and other interviews took place, in which *Overbury* admitted that he could not complete the purchase before the 14th of January.

On the 14th of January *Cameron* wrote to the Plaintiff's solicitor as follows:—

"In consequence of the default of your client to produce the deeds set out in the abstract of title received from you on the 24th ult., we have been prevented examining them in the usual course, and thereby the completion of the contract for purchase is rendered impossible to-day, when possession should have been given to the purchaser. Under these circumstances my client abandons the contract; and I have to request that you will intimate to Mr. *Kingston*, the agent, that he may return the £70 deposit paid by Mr. *Thomas* to him on the 14th ult."

The Plaintiff's solicitor still pressed the Defendant's solicitor to examine the deeds with the abstract, and, after some correspondence, on the 16th of February, 1865, the Defendant's solicitor consented to do so "without prejudice to the right exercised by the purchaser to rescind his contract." Accordingly, *Cameron*, the Defendant's solicitor, attended on the 19th of February, and examined the deeds, and on the 21st sent requisitions on the title to the Plaintiff's solicitor. The principal requisition referred to the production of the lessor's title, on which the purchaser insisted, although the vendor's solicitor urged him to waive it, and to the satisfaction of a mortgage on the premises, which was irredeemable until 1868. On the 13th of April, 1865, the Defendant's solicitor wrote again to the Plaintiff's solicitor, saying, that unless the further abstract required was produced within a fortnight the purchaser would abandon the contract.

No further abstract having been furnished, the purchaser's solicitor wrote again on the 1st of May, saying that the contract must be considered as abandoned, and asking for a return of the

deposit. A further abstract was sent on the 15th of May, and various other negotiations took place between the parties, which were continued after the filing of the bill, and an attempt was made to compromise the matter, which was, however, repudiated by the Plaintiff, and formed the subject of argument before the Lords Justices; but, in consequence of the view which their Lordships took of the merits of the case, it became unnecessary to decide the point.

The Vice-Chancellor decreed specific performance of the agreement, and an account of the damages which the Plaintiff had sustained by the Defendant refusing to take possession of the house when it was tendered to him. From this decision the Defendant *Thomas* appealed.

Mr. *Bacon*, Q.C., and Mr. *F. H. Warner*, for the Appellant:—

Although time is not usually of the essence of the contract in agreements for the purchase of land, yet it will be so considered, if it appears to have been the intention of the parties: *Parkin* v. *Thorold* (1). In the present case the Defendant gave express notice to the Plaintiff that he bought the house for a residence, and wished the purchase to be completed at the particular time mentioned in the contract. The word "possession" in the contract did not mean a bare possession of the premises, but possession with a good title shewn—such a possession as would justify the purchaser in laying out money on the house: *Boehm* v. *Wood* (2). The Plaintiff was unable to give such possession on the day named, and the Defendant then abandoned that contract. The subsequent negotiations were no waiver of the protest: *Magennis* v. *Fallon* (3); and, in fact, they were carried on expressly without prejudice to the abandonment.

But, independently of the right of the Defendant to abandon the contract on the 14th of January, he had an unquestionable right to rescind it afterwards, on giving reasonable notice to the Plaintiff. This he did by his letter of the 13th of March, 1865.

Mr. *Druce*, Q.C., and Mr. *C. Browne*, for the Plaintiff:—

If it is intended that time should be of the essence of the contract,

(1) 16 Beav. 59. (2) 1 Jac. & W. 419. (3) 2 Moll. 576.

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it must be so distinctly stated in the agreement: *Boehm* v. *Wood* (1). This was not so in the present case. The receipt, which refers to the event of the sale not being completed, specifies no time for the completion. "Possession" in the agreement means legal possession, or legal entry. This the Plaintiff was able to give, for his title was a good one, although he was not able then to shew it: *Roberts* v. *Berry* (2); *Lennon* v. *Napper* (3); *Sugden's* Vendors and Purchasers (4).

The abandonment of the contract, if good originally, was waived by the subsequent negotiation. The attempt to rescind the contract on the 13th of March, 1865, was nugatory, because a reasonable time was not given to the other party.

Mr. *Bacon*, in reply.

Nov. 11. LORD CAIRNS, L.J.:—

So far as the construction of the memorandum is concerned, there cannot, I think, be any doubt that the words "possession to be given on the 14th of January next," point to and intend, not a possession on sufferance, or with the risk of eviction, but a possession to be delivered to the purchaser, as proprietor, in exchange for the price, and as Lord *Eldon*, in *Boehm* v. *Wood* (5), puts it, after such a previous manifestation of title as would shew that the possession could be safely taken. A contract may indeed be, and sometimes is, so framed as to shew by the contrast drawn between possession and the completion of the purchase, that the former possession is intended to be provisional and irrespective of title. It was argued that the words in the receipt given by the vendor for the deposit, "to be returned in event of the sale not being completed through the vendor's fault," were in this case used in contrast to "possession" in the contract. The receipt was, however, given after the contract was written and signed, and I read the words "completed" in the receipt as referring to the period already mentioned for possession in the contract, namely, the 14th of January, 1865,

(1) 1 Jac. & W. 419.
(2) 3 D. M. & G. 284.
(3) 2 Sch. & Lef. 682.
(4) 10th Ed. p. 218.
(5) 1 Jac. & W. 420.

otherwise there would be a stipulation for the return of the deposit, depending on delay in completing the purchase, without any time by which delay might be tested, except the period of reasonable time which the law would imply—a test for such a purpose eminently vague and unsatisfactory.

The legal construction of the contract is, in my opinion, such as I have expressed, and the construction is, and must be, in equity the same as in a Court of law. A Court of equity will indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps toward completion, if it can do justice between the parties, and if (as Lord Justice *Turner* said in *Roberts* v. *Berry* (1)), there is nothing in the "express stipulations between the parties, the nature of the property, or the surrounding circumstances," which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract.

Of the three grounds against interference mentioned by Lord Justice *Turner*, "express stipulations" requires no comment. The "nature of the property" is illustrated by the case of reversions, mines, or trades. The "surrounding circumstances" must depend on the facts of each particular case.

In this case the property sold was a residential leasehold house, not apparently let or producing rent at the time of sale, and intended by the Defendant to be used as his own residence. [His Lordship then referred to the statements in the Defendant's answer, and in the affidavit of the Plaintiff, and continued:—]

Looking to the admitted facts thus stated, I can have no hesitation in saying, that in my opinion it was essential, and known to both parties to be essential, that the Defendant should have, by the time stipulated, possession of the house for repairs and improvements with a view to his own immediate residence, a possession, therefore, which could not be disturbed—a possession, that is to say, with a title, and that to enforce against the purchaser performance of the contract after a breach of it by the vendor in this respect would be inequitable.

(1) 3 D. M. & G. 284.

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The abstract was delivered two days before Christmas Day, 1864. An appointment to examine the deeds was forthwith made by the Defendant's solicitor for the 27th, and the statement in the answer as to what then occurred is not contradicted.

There was, therefore, no delay or waiver on the part of the Defendant in asserting and maintaining his rights. It appears that during all this time the vendor could not make a good title, irrespective of the question of his landlord's title to the house; for there was a mortgage irredeemable before 1868, with powers of sale and distress in the mortgage.

I think the Defendant was, under the circumstances, entitled on the 14th of January to refuse to perform the contract. Some subsequent negotiation took place as to making out the lessor's title, but it was after this refusal had been distinctly made, and it was expressly without prejudice to the Defendant's right so asserted.

It is unnecessary, in the view I take of this case, to consider whether the compromise of this suit alleged to have been afterwards made was or was not binding on the Plaintiff. In my opinion the suit for specific performance fails, and the bill ought to have been dismissed, with costs.

SIR JOHN ROLT, L.J.:—

The first question in this case is, what is the true legal construction of the words in the contract, "possession to be given on the 14th of January next." Do they mean possession *simpliciter*, with or without title, or are they to be construed as meaning possession with complete title previously shewn? I am of opinion, excluding everything that passed verbally between the parties or their agents at the time of the contract, that the possession referred to must be construed, even at law, to mean possession with a complete title previously shewn, As a general rule, I think the word "possession" in such a contract should be so construed. A conveyance previously executed is, probably, not necessary; but it is not material to inquire into this, for here it is admitted that a good title was not previously shewn. There may be cases in which, from the nature of the property, or from the context, the word may admit of a different meaning, and that appears to have been Lord *Eldon's*

ultimate decision of the meaning of the expression as used in the agreement in *Boehm* v. *Wood* (1); but general possession without a title would, or might be, the source of great embarrassment to a purchaser, and could scarcely have been in contemplation at the time of the contract, and it ought not, therefore, to be generally accepted as the true meaning of the expression standing alone. In this case I think there is nothing in the nature of the property, or in the context, to control what I deem to be the ordinary and general meaning of the word. On the contrary, the receipt for the deposit of £70, which was written at the same time as the agreement, if it can be referred to for this purpose, appears to me to confirm this reading of the agreement.

Now, as a matter of construction merely, I apprehend the words must have the same meaning in equity as at law. The rights and remedies consequent on that construction may be different in the two jurisdictions, but the grammatical meaning of the expression is the same in each. And if this be so, time is part of the contract, and if there is a failure to perform within the time the contract is broken in equity no less than at law. But in equity there may be circumstances which will induce the Court to give relief against the breach, and sometimes even though occasioned by the neglect of the suitor asking relief. Not so at law. The legal consequences of the breach must there be allowed strictly to follow. The Defendant is entitled to say that the contract is at an end, and it is in this sense, I apprehend, that in such cases it is said that time is of the essence of the contract at law, though not necessarily so in equity. The language of Lord *Redesdale* in *Lennon* v. *Napper* (2), cited by Lord Justice *Knight Bruce*, in *Roberts* v. *Berry* (3), fully explains my view on this part of the case.

Then has the Plaintiff, who has broken his contract by not giving possession on the day named with complete title previously shewn, made out a case for relief against this breach of the contract on his part? Here it will be necessary not only to examine the circumstances which have occasioned the non-performance of the contract by the Plaintiff, but the consequences of the breach to the Defendant? The breach may have been purely accidental, occasioned

(1) 1 Jac. & W. 419. (2) 2 Sch. & Lef. 682.
(3) 3 D. M. & G 284.

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by circumstances wholly beyond the control of the Plaintiff, but it the relief will work manifest injustice to the Defendant it cannot be granted.

Now I will assume that the Plaintiff was not guilty of actual negligence, and that the contract was broken in spite of every exertion on his part to perform it. He was, no doubt, imprudent in entering into a contract which a little consideration might have told him he probably would not be able strictly to perform. But put that on one side. Can relief be given without manifest injustice to the Defendant? Here it becomes necessary to examine the evidence. The Defendant is entitled to prove, if he can, that the object for which he purchased required possession with a good title on the day named, and that to call upon him to become the purchaser with no title shewn till weeks or months after that day, would be asking him to do that which, for special reasons, he stipulated against by the contract. And he has entered into evidence for this purpose. The Plaintiff, also, was entitled to enter into evidence to counteract this; and I will examine the effect of the evidence on the original case in the first instance, excluding, for the present, the consideration of the question whether the Defendant has, by his subsequent conduct, waived his right, if he ever had it, to resist specific performance.

The answer of the Defendant is made an affidavit, and is to be read in evidence. The third paragraph is the most material, and has been already read. In effect, the Defendant swears that at the date of the contract he had then recently sold his own residence, and was obliged to find another within a very short period; that he bought consequently with a view to immediate occupation by himself, and that the Plaintiff knew this; that he, the Defendant, was mainly induced to enter into the agreement by the Plaintiff's statements that the purchase should be completed, and that he should be let into possession within a month; and that he, the Defendant, understood from the Plaintiff and his agent that the meaning of the agreement was, that possession was to be given and the sale completed on the 14th of January.

The Plaintiff and his agent, Mr. *Elstob*, admit, in their affidavit, that the Defendant informed them that he wanted possession by the 14th of January, in order that he might make any alterations

which he might think desirable in the grounds and gardens, and that he might furnish. Now ought not this to have satisfied them that the possession was necessarily to be preceded by a good title shewn? It is true they go on to deny that anything passed which could warrant the conclusion that the purchase was to be completed on the 14th of January, and as the Defendant's affidavit spoke of "the purchase being completed" before the day, and not merely of "a good title being shewn," they have no doubt answered the affidavit in terms, and there is a conflict of evidence; but it is not immaterial to observe that the Plaintiff does not insist that he supposed that possession would answer the Defendant's purpose without a good title being shewn. He knew that the purpose for which possession was wanted would make possession without title valueless.

The correspondence down to and including the 14th of January confirms this view of the understanding of the parties as to the effect of the original agreement. The abstract is sent by the Plaintiff's solicitor on the 23rd of December. On the 24th the Defendant's solicitor makes an early appointment for examining the abstract with the deeds. The Plaintiff's solicitor was not ready with the deeds on the day appointed, and he promised to make another appointment. On the 3rd of January the Defendant's solicitor reminds him that he is waiting for an appointment. Some interviews subsequently take place, at one of which the Plaintiff's solicitor states, for the first time, that he cannot possibly complete by the 14th; and on that day the Defendant abandons the contract. Putting subsequent waiver by the Defendant out of consideration, I cannot doubt, if my view of the construction of the agreement is right, that the Plaintiff could not, under these circumstances, ask to be relieved from his own breach of the contract and claim specific performance against the Defendant.

But assume, for the sake of the argument, that my construction of the agreement is wrong, and that at law that agreement must be read as requiring possession only on the day named, without reference to title, and that, consequently, the tender of possession actually made on the 14th of January was sufficient at law. Will that support the decree? I am disposed to think that though, no doubt, the Defendant is thus placed under much greater

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difficulty, still, excluding the question whether the Defendant has waived his right to resist specific performance by subsequent conduct, the case, upon the same facts, would then stand thus:—The Plaintiff has, upon this construction, a valid legal agreement which he has not broken at law, and he asks specific performance of it in equity. I think the judicial discretion which this Court clearly possesses of refusing specific performance in certain cases of agreements undoubtedly valid, ought to be carefully and sparingly exercised. Contracts ought to be performed. To break them, and to propose compensation for the breach by damages, is not complete justice. But the discretion of this Court as to granting or refusing specific performance has, nevertheless, been wisely as well as firmly established, and in this case, adding to the evidence on which I have already commented only the fact that it was not shewn to the Defendant that he could safely take possession with a good title till the following month of May (even if it has yet been shewn at all), I think that even should this construction prevail, this is a case in which it would be right to leave the Plaintiff to his remedy at law, if he has any. It is, however, unnecessary to pursue this subject further, because my view of the legal construction is different.

There still remains the question, whether the Defendant has by his subsequent conduct so acted as to entitle the Plaintiff to say in equity that he ought now to be compelled to perform his contract. The subsequent facts are these:—The Defendant's solicitor, having in the meantime distinctly adhered to the abandonment of the contract which he had communicated to the Plaintiff on the 14th of January, was, on the 16th of February, induced, apparently from deference to the opinion of the Plaintiff's counsel, to propose, without prejudice to his right to rescind, to examine the abstract with the deeds. Having done this, he, on the 21st of February made requisitions on the title, and on the 13th of April, the requisitions not having been complied with, he intimated to the Plaintiff's solicitor that if he did not receive a further abstract admitted to have been necessary, and have an appointment for examining the same with the deeds within a fortnight, he should, on behalf of the Defendant, abandon the contract. The further abstract was not sent till the 15th of May.

It is said for the Defendant that a protest against an adversary's right is not waived by subsequent negotiation, and *Magennis* v. *Fallon* (1) was cited for the proposition. I think the proposition thus stated too general, and that the question must, in each case, very much depend upon the terms of the protest, and the nature of the subsequent negotiations, and other facts. In this case, if the Plaintiff had at once and promptly, after the Defendant's proposal of the 16th of February to examine the abstract, shewn a good title, I should have doubted whether the Defendant could escape from the contract. But nothing effectual was done before the 13th of April, when the Defendant again intimated his intention to abandon. It was argued for the Plaintiff, that the fortnight then proposed to be allowed for the delivery of a further abstract was not a reasonable time. Probably not, if it had been the first complaint of delay by the Defendant; but having regard to all the dates and facts I have stated, I think the Plaintiff was not entitled on the 15th of May to re-open the matter.

This view of the case makes it unnecessary to consider the Defendant's contention that there was a subsequent agreement between the parties which relieved him from the original contract. I think no such agreement was ever concluded; but, as I think on other grounds that he ought not to be decreed to perform the original contract, this is immaterial.

The decree appealed from will therefore be discharged, and the Plaintiff's bill dismissed with costs.

Solicitor for the Plaintiff: Mr. *Overbury.*
Solicitor for the Defendant: Mr. *Cameron.*

(1) 2 Moll. 576.

L. J. R. 1867 Nov. 21.

PRUDENTIAL ASSURANCE COMPANY *v.* THOMAS.

Practice—Pleading—Interpleader—Injunction—Suit in Equity restrained.

Proceedings in one suit in equity may be restrained by an injunction obtained in another suit.

Where there are two claimants to a fund, and one files a bill against the stakeholder without making the other a party, the stakeholder may file an interpleader bill and restrain the proceedings in the former suit.

Order of *Malins*, V.C., discharged.

THIS was a motion in an interpleader suit.

James Black, in 1863, insured his life for £200 in the *Consolidated Assurance Company*, which was afterwards merged in the *Prudential Assurance Company*.

By an indenture, dated the 16th of June, 1863, *James Black* purported to assign the policy, and all moneys payable thereon, to *F. R. Thomas*, and notice of this assignment was given to the company. *James Black* died in May, 1867, and *Thomas* claimed the £200 from the company; but before the money was payable, the company received notice from *Johanna Black*, widow and executrix of *James Black*, not to pay the money to *Thomas*, as she disputed the validity of the assignment. Some interviews and some correspondence took place between the secretary of the company and *Thomas's* solicitor, and *Thomas* alleged that the secretary promised to pay the money secured by the policy to him, which the company denied.

The money secured by the policy was payable on the 29th of July, 1867, on which day there was an interview between *Thomas's* solicitor and the secretary, at which *Thomas's* solicitor agreed to send the solicitor of the company a copy of the deed; but on the 1st of August, 1867, without any further communication, *Thomas* filed a bill against the company alone, asking payment of the money, and on the 9th of August the company filed this bill against *Thomas* and *Johanna Black*, stating shortly the facts above stated, but only mentioning the last interview between the secretary and *Thomas's* solicitor, and praying for liberty to pay the £200 into Court, and that the Defendants might be

directed to interplead and settle their rights to the £200, and that the proceedings in *Thomas's* suit might be stayed, and that each of the Defendants might be restrained from any other proceeding against the Plaintiffs in respect of the £200.

On the 12th of August the Vice-Chancellor *Malins* granted an *ex parte* injunction restraining *Thomas* from proceeding in the suit, and it was stated at the bar, and appeared from the judgment of His Honour, that the papers had been sent to him in the Vacation, and that he had granted the injunction without hearing counsel. *Thomas,* on the 14th of November, moved to dissolve the injunction, and the Vice-Chancellor *Malins* dissolved it accordingly, saying that the company had dealt with *Thomas* in a manner which amounted to a contract to pay him; that the company might have proposed to *Thomas* to make Mrs. *Black* a party, and have the question settled in that suit, instead of filing this bill, and that if the circumstances had been stated in the bill His Honour would not have granted the injunction.

The company appealed.

Mr. *Osborne,* Q.C., and Mr. *Phear,* for the company:—

We had no other course than to file this bill, as *Thomas* had not chosen to make Mrs. *Black* party to his suit. She is still, at law, the hand to receive the money: *East and West India Dock Company* v. *Littledale* (1). We were quite willing to pay *Thomas* if we could safely do so; but we never agreed to do so. In *Diplock* v. *Hammond* (2), the other claimant was made party to the first suit. The object of interpleading is to prevent the innocent holder of money from being vexed by two suits. What is there in *Thomas's* suit to prevent Mrs. *Black* from filing her bill? In *Warington* v. *Wheatstone* (3), an injunction was granted to restrain a suit in equity, to which all were parties, and that is much stronger. So in *Sieveking* v. *Behrens* (4). We cannot safely pay the money into Court in *Thomas's* suit.

Mr. *Glasse,* Q.C., and Mr. *Terrell,* for *Thomas*:—

You cannot institute a suit to restrain the proceedings in

(1) 7 Hare, 57.
(2) 2 Sm. & Giff. 141.
(3) Jac. 202.
(4) 2 My. & Cr. 581.

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another. If the company in *Thomas's* suit stated that Mrs. *Black* made a claim, then *Thomas* would be obliged to make her a party, and if not, the order of the Court for payment of the money would be a protection to the company. The company should have given notice to *Thomas* that his suit was imperfect. Instead of avoiding multiplicity of suits, here is a multiplicity. One suit in equity cannot be restrained by another, as the Defendant in equity may make his case out as well as if he was Plaintiff. The motion ought to be entitled in both suits.

Mr. *Crossley,* for Mrs. *Black.*

Mr. *Osborne,* in reply.

Sir John Rolt, L.J., stated the facts of the case, and said that, in his opinion, the dealings between the company and *Thomas* did not amount to a contract by the company to pay *Thomas,* and that the interpleader bill was properly framed, and did not conceal or misrepresent the case. His Lordship continued:—

Then the bill was filed on the 1st of August by Mr. *Thomas,* and it was an imperfect bill—a bill which he must have known could not settle the question. It did not purport or affect to remove out of the way of the insurance company the difficulty as to the payment of the money. They throughout had said that they were ready to pay, and anxious to pay, and all they wanted was, that they should not be vexed by a double litigation.

They were told positively that if they paid *Thomas,* the legal hand to receive would hold them responsible for any error. In that state of things *Thomas* thought it right to file an imperfect bill, which did not remove the difficulty out of the way of the insurance company. As he did not make Mrs. *Black* a party to that bill, it was quite impossible for the insurance company to pay the money into Court in that suit. It does appear to me that the bill filed on the 9th of August by the insurance company is some evidence of their *bona fides.* They did not want to keep the money, and they certainly had no bias towards one claimant or the other. It is sometimes suggested that money is not paid by a stakeholder because he prefers holding it, but this cannot be said

of the insurance company, for they were ready to get rid of the money the moment they could do so with safety. They were not able to pay it in in a suit to which only one of the claimants was a party, and accordingly they filed a short bill, which, I think, raises every question, conceals nothing, and misrepresents nothing, considering what are the facts necessary to be stated in an interpleader bill where the Plaintiff proposes to bring into Court at once the money which is in dispute, and asks for no order except upon that condition. Of course it would be a most material thing if he concealed a fact which shewed that he had contracted with one of the parties; but if he has not concealed a fact of that kind, it does appear to me that it would not be right to encourage the insertion in interpleader bills of long narratives and correspondence for the purpose of shewing that there has been no contract with one of the parties. It appears to me, therefore, that some order for an injunction was right at the time when the Vice-Chancellor granted the injunction.

Then it is said that the order which was made ought not to have been an order to stay the prosecution of the other suit. It is first of all said that the existence of a suit in this Court by one of the claimants was a sufficient reason why the Court should not have granted the injunction; but I think the case of *Warington* v. *Wheatstone* (1) is clear upon that point, and is a very distinct authority that there is a reason for coming to this Court by way of interpleader, when one claimant insists that she will hold the company responsible if they pay the adverse claimant. One of the claimants was proceeding in equity to enforce payment, and the other was declaring that she would hold the company responsible if they paid that claimant; and it appears to me that that was a reason why the company should force them to interplead. If *Thomas* had proceeded at law it would not have been in his power to have made Mrs. *Black* a party to the litigation; but, having determined to come into a Court of equity, nothing would have been easier for him than to have made her a party. He knew that she was a person claiming; he knew that the only reason the company alleged for not paying was, that she was making an adverse claim, and therefore a *bonâ fide* litigation

(1) Jac. 202.

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by him ought to have included Mrs. *Black* as a party to his suit. Certainly the existence of that suit did not stand in the way of the Plaintiffs filing a bill of interpleader.

Then it was said that the order ought not to have stayed the prosecution of that other suit. At first I was disposed to think that the course of the Court generally is to leave every suit in equity to stand or fall upon its own merits, and not in one suit to grant an injunction to stay or restrain proceedings in another; but the case of *Warington* v. *Wheatstone* (1) serves to shew that an injunction in an interpleader suit may extend to restrain proceedings in equity as well as at law against the stakeholder, as appears from the decree which is given in *Seton* on Decrees (2); and the case of *Sieveking* v. *Behrens* (3) seems to have been to the same effect. I am, therefore, not able to say that the order for the injunction was in any respect wrong, and I think that *Thomas*, the Plaintiff in the other suit, having chosen to institute that suit, it was right to bring the money into Court in a suit to which Mrs. *Black* was a party, and to restrain all other proceedings in the matter. I think there is nothing inconsistent with the course of practice to say that the injunction should extend, as the Vice-Chancellor originally extended it, to stay proceedings in equity as well as at law, and therefore that his original order was right.

Order of the Vice-Chancellor dissolving the injunction discharged. No costs of the appeal. The costs in the Court of the Vice-Chancellor *Malins* to be dealt with by the Vice-Chancellor at the hearing. Liberty to apply in *Thomas's* suit for the costs of that suit.

Solicitor for the Company: Mr. *J Barnard.*
Solicitors for Mr. *Thomas:* Messrs. *Thomas & Son.*
Solicitor for Mrs. *Black:* Mr. *Ryan.*

(1) Jac. 202. (2) Vol. ii. p. 962, 3rd Ed.
(3) 2 My. & Cr. 581.

UNITED STATES OF AMERICA *v.* McRAE.

L. C.
1867
Nov. 25;
Dec. 3, 4, 10, 13.

Pleading—Plea—Discovery—Relief—Forfeiture—Penalty under Foreign Law.

To a bill filed by the *United States of America*, alleging that they had succeeded to the rights of the late *Confederate States of America*, and praying an account and relief in respect of money received by the Defendant, as agent for the *Confederate States*, the Defendant pleaded that by a law of the *United States* the property of all persons who had acted as agents for the *Confederate States* was liable to confiscation, and that proceedings were actually pending in *America* for confiscation of his property there on the ground of his having so acted as agent, and that he could not answer without exposing himself to such confiscation, and that the Plaintiffs could not have relief without waiving the right to confiscate:—

Held, that the plea was bad so far as related to the relief, but good as to the discovery, and that the Plaintiffs must be allowed to proceed and prove their case if they were able to do so without the answer of the Defendant.

King of the Two Sicilies v. *Willcox* (1) distinguished.

Order of *Wood*, V.C., affirmed in part and reversed in part.

THE bill in this case was filed by the *United States of America*, and asked for an account and payment of moneys received by the Defendant in this country as agent for the government of the late *Confederate States of America*, to whose rights the *United States of America* had succeeded; and interrogatories to the bill were filed. The Defendant pleaded that a law had been passed in the *United States* confiscating the property of all persons who had acted as agents for the late *Confederate States*, under which law proceedings had been taken in *America* to recover property there which belonged to the Defendant, and that the Defendant was, therefore, not bound to answer, and that the Plaintiffs were not entitled to proceed in this suit without waiving the forfeiture of his property.

The Vice-Chancellor *Wood* allowed the plea, as reported (2), where the pleadings are fully set out.

The Plaintiffs appealed.

Sir *Roundell Palmer*, Q.C., for the Plaintiffs:—

The case made by this plea is, in substance, that because the Defendant has committed an offence against the laws of his own country he is to be at liberty to refuse in the Courts of this

(1) 1 Sim. (N.S.) 301. (2) Law Rep. 4 Eq. 327.

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country a discovery of the Plaintiffs' property. The Vice-Chancellor went on two grounds:—1. That the rule that he who comes into equity must do equity was applicable. 2. That the analogy of the cases as to election whether to proceed at law or in equity governed the present. The maxim that he who comes into equity must do equity has no application. The principles according to which it is applied are explained in *Hanson* v. *Keating* (1), where it is shewn that it does not extend to settling unconnected matters between the parties; and this is recognised as a sound exposition of the law in *Gibson* v. *Goldsmid* (2). The cases as to election only apply where a double remedy is given by the laws of this country. The present case is somewhat analogous to that of an agent having a lease from his employer determinable on his failing to render account properly. He never would be allowed to say that he would not account unless the landlord waived the forfeiture. The case of *King of the Two Sicilies* v. *Willcox* (3) shews that this plea is no defence even to discovery, the penalty not being one imposed by the laws of this country. *Green* v. *Weaver* (4), approved of in *Robinson* v. *Kitchin* (5), is a very analogous case.

Mr. *G. M. Giffard*, Q.C., with Sir *Roundell Palmer*:—

The bill merely asks for property which certainly belongs to the Plaintiffs, and never belonged to the Defendant; the proceedings in *America* relate to property which belonged to the Defendant and has been forfeited to the Plaintiffs because the Defendant has committed a statutable offence. The Plaintiffs cannot be deprived of their own property because the Defendant has committed a criminal act which enables the Plaintiffs to take his. There is no analogy to the cases of a foreclosure bill, a tithe bill, or a bill for waste, because in those cases there are two remedies for the same property, and the Court merely says that the Plaintiff shall not pursue both.

Then, as to the discovery, it is impossible to distinguish this case from *King of the Two Sicilies* v. *Willcox* (6). We understand

(1) 4 Hare, 1.
(2) 5 D. M. & G. 757, 765.
(3) 1 Sim. (N.S.) 301.
(4) 1 Sim. 404.
(5) 8 D. M. & G. 88; 2 Jur. (N.S.) 294.
(6) 1 Sim. (N.S.) 301; 15 Jur. 214.

penalties imposed by the law of *England*, but not those imposed by foreign law, and the privilege of not answering cannot be extended to that case.

Mr. *Wickens*, on the same side:—

Suppose that a man commits a forgery in a foreign country, and then gets possession of property of a foreign government and brings it to this country, can it be said that the foreign government is not to sue for its own property because it has done its duty, and has punished the forger? Can the foreign government be asked to waive the penalty, or, in other words, not to punish the man, as a condition precedent to recovering its own property in a Court of equity? In *Emperor of Austria* v. *Day* (1), it was never suggested that the Emperor of *Austria* could be put to terms, and be made to promise not to punish *Kossuth* for treason. The principle of not answering because the answer might expose the Defendant to penalties, is inapplicable to a foreign country; for this Court cannot say that the answer would be evidence in the foreign country.

[The LORD CHANCELLOR:—If the plea is held bad as to the relief, but good as to the discovery, what would be the consequence?]

There is no record of such a case, but probably the Defendant would not be obliged to answer, and the Plaintiff would be allowed to go on and prove his case in any other way if he could.

Mr. *W. M. James*, Q.C., in support of the plea:—

Where there are penalties attached, this Court has always refused to allow the Plaintiff to proceed unless he waives the penalties, and there is no difference in the case of a foreign sovereign being Plaintiff. Suits for foreclosure, for tithes, for waste, and for usury, are all on that principle. It is not correct to say that the property is the same in those cases; the suit is for the property, the penalty is only measured by the amount of the property. Where waste had been committed by cutting timber, the remainderman might sue in trover for the timber, and at the same time sue for the penalties. The Plaintiffs here say:

(1) 3 D. F. & J. 217, 7 Jur. N.S. 639

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"You were agents for the late *Confederate States*, and as such you got possession of this property, and as such we proceed to punish you by taking your property in *America*." The grounds are the same for both proceedings. *Green* v. *Weaver* (1), and *Paxton* v. *Douglas* (2), are authorities, and the Plaintiff cannot both approbate and reprobate. In *King of the Two Sicilies* v. *Willcox* (3) the qualification introduced as to a foreign country was unnecessary for the determination of the case, was never before adopted, and cannot be maintained. No man can be called upon to criminate himself for the benefit of a foreign sovereign.

Mr. *Marten*, with Mr. *W. M. James*:—

The Plaintiffs must waive their rights of forfeiture before they come here: *Phelps* v. *Prothero* (4); *Lord Uxbridge* v. *Staveland* (5); *Inman* v. *Wearing* (6), and there is no difference as to a foreign country. It is often difficult, if not impossible, for the Judge to see what injury the Defendant can sustain by answering, still the privilege is always allowed, and must, therefore, be allowed though, the penalty being incurred in a foreign country, the Judge may not be able to know the injury sustained. In *Welby* v. *Duke of Rutland* (7), and *Harrison* v. *Southcote* (8), pleas seem to have been allowed to the discovery, but not to the relief.

Mr. *Benjamin*, with them:—

Two proceedings are pending by the same Plaintiff against the same Defendant in the same right, one for a penalty, and that cannot be allowed. The Plaintiffs allege that the Defendant was a lawful agent, and at the same time that his agency was unlawful: *Bristow* v. *Whitmore* (9). Let the Plaintiffs proceed at law if they have a right: *Spargo* v. *Brown* (10); but they cannot proceed both civilly and criminally. If the Plaintiffs claim to be the principals, they must indemnify their agents. There is no analogy between this and the case of a private person who cannot waive a punishment, for the Plaintiffs can do so. The Plaintiffs say, because you

(1) 1 Sim. 404.
(2) 19 Ves. 225.
(3) 1 Sim. (N.S.) 301.
(4) 7 D. M. & G. 722.
(5) 1 Ves. Sen. 56.
(6) 3 De G. & Sm. 729.
(7) 2 Bro. P. C. 39.
(8) 1 Atk. 528, 539.
(9) 9 H. L. C. 391; 8 Jur. (N.S.) 291.
(10) 9 B. & C. 935.

are our agents we claim our property, and for the very same reason we forfeit yours. This bill is, in fact, an attempt to obtain evidence in aid of a political prosecution in a foreign country.

Sir *Roundell Palmer*, in reply:—

The question whether this is a proper case for a suit in equity cannot be raised by plea. The doctrine in cases of waste and tithe is, that if a man comes into equity he must waive his legal forfeiture, but that does not apply here. If the crown jewels of *France* had been stolen and brought here, it would be absurd to say that the French government could not institute proceedings to recover them without promising not to punish the thieves. The plea follows the old form, adapted to bills which prayed discovery, but probably must be taken to apply to the discovery asked for by interrogatories, and the effect of allowing a plea to the discovery and not to the relief, appears from *Mitford* on Pleading (1).

Dec. 13. LORD CHELMSFORD, L.C., after stating the case, continued:—

The questions raised upon this appeal are, first, whether the plea is a good plea to the whole bill; and, secondly, whether it is good so far as the Plaintiffs seek to compel a discovery from the Defendant, but bad as to the relief prayed for by the bill.

I will consider, first, the validity of the plea, so far as it applies to protect the Defendant from answering. The Defendant relies in support of it on the well known rule, applying both to the examination of witnesses and to interrogatories of Defendants in equity, that no person is compellable to answer any question which has a tendency to expose him to a criminal charge, penalty, or forfeiture. If, therefore, the Defendant, by answering the interrogatories in the present suit, could render himself liable to danger of forfeiture of his property for a breach of some law of this country, there could be no question that he might refuse to answer. Nor is this disputed by the Plaintiffs, but they say that this protection from answering applies only where a person might

(1) 4th Ed. p. 285.

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expose himself to the peril of a penal proceeding in this country, and not to the case where the liability to penalty or forfeiture is incurred by the breach of the laws of a foreign country. In support of this distinction the Plaintiffs rely upon the opinion of Lord *Cranworth*, V.C., in the case of *King of the Two Sicilies* v. *Willcox* (1). That case has a very close resemblance to the present. The King of the *Two Sicilies* instituted the suit for the purpose of obtaining possession of a steam vessel purchased in *England* by two of the Defendants for a revolutionary government, which had usurped the Plaintiff's authority and regal functions in *Sicily*, and had transmitted sums of money contributed by a large number of Sicilians for the purchase of a steam vessel, which steam vessel was then in the Port of *London*; and the bill charged that the Defendants had in their possession or power divers deeds, documents, accounts, papers, and writings, from which, if produced, the truth of the matters would appear. The Defendants, by their answer, so far as the present point is concerned, stated that the production of the required particulars would, as they believed, and had been advised, expose and render them subject to criminal prosecution, punishment, and penalties in *Sicily*. Lord *Cranworth* held that the Defendants were bound to answer; that the rule which they relied upon was one which existed merely by virtue of our own municipal law, and must have reference exclusively to matters penal by that law, to matters which, if disclosed, the Judge would be able to say, as matter of law, whether they would or would not entail penal consequences; that no Judge could know as matter of law what would or would not be penal in a foreign country, nor form any judgment as to the force or truth of the objection of a witness when he declined to answer such a question.

I quite agree in the general principles stated by Lord *Cranworth*, and in their application to the particular case before him. There was nothing on the face of the proceedings to inform the mind of the Judge whether there was any, and, if any, what, foreign law applicable to the case, or, whether the Defendants had incurred any penalty or forfeiture by acting in this country as the agents of the revolutionary government in *Sicily*. The only ground upon

(1) 1 Sim. (N.S.) 301; 15 Jur. 214.

which the Defendants objected to produce the documents in their possession was stated in their answer to be, that they believed and had been advised that the production of them would "expose and render them subject to criminal prosecution, punishment, and penalties in *Sicily*." This did not furnish the least information what the foreign law was upon the subject, though it was necessary for the Judge to know this with certainty before he could say whether the acts done by the persons who objected to answer had rendered them amenable to punishment by that law or not. Upon the particular circumstances of the case of *King of the Two Sicilies* v. *Willcox* (1) I have no doubt that it was most correctly decided. But in giving judgment Lord *Cranworth* went beyond the particular case, and expressed his opinion that the rule upon which the Defendants relied to protect them from answering was one which existed merely by virtue of our own municipal law, and which must have reference exclusively to matters penal by that law. It was unnecessary to lay down so broad a proposition to support the judgment which he pronounced, and he certainly could not have contemplated a case where the presumed ignorance of the Judge as to foreign law is completely removed by the admitted statements upon the pleadings, in which the exact nature of the penalty or forfeiture incurred by the party objecting to answer is precisely stated, and where the Plaintiffs calling for an answer are the sovereign power by whose authority and in whose name the proceedings for the forfeiture are instituted, and who have the property to be forfeited within their reach. What would have been Lord *Cranworth's* opinion upon such a state of circumstances it is impossible for me to conjecture; but it is very different from that which was before his mind in that case, and I cannot feel that there is any judgment of his which ought to influence my decision upon the present occasion.

The plea in this case sets out the Act of Congress under which the forfeiture is said to have been incurred. That being admitted, it is the same as if it were proved as a fact in the case. Having it thus brought before him, is the Judge competent to construe the Act for himself, or does he (as it has been argued) require the further aid of a person learned in American law to inform him

(1) 1 Sim. (N.S.) 301.

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whether the case of the Defendant is brought within it? In the case of *Di Sora* v. *Phillipps* (1) the House of Lords had to consider, in the case of an agreement made in a foreign country, in the language of the country, what degree of assistance was required by the English Judge in its construction, and it was laid down that the Judge, in the first place, must have a translation, a translator being a witness as to the meaning and also the grammatical construction of the words. He must then have the way cleared for him by explanatory evidence of any words which are of a technical description, or which have a peculiar meaning different from that which, literally translated into our language, they would bear; and if there is any established principle of construction of the particular instrument by the foreign tribunal, proof of it must be given. But the witnesses having supplied the Judge with all these facts, they must retire and leave his sufficiently-informed mind to his own proper office, that of ascertaining for himself the intention of the parties; or, in other words, of construing the language of the instrument in question.

In this case the assistance of a translator is not required, nor is it suggested that there are any words in the Act of Congress which bear a peculiar meaning different from the ordinary one, or that the Acts of the American Legislature have a construction peculiar to themselves. I do not see that there is any impediment to an English Judge with the Act of Congress before him construing it for himself without further aid, just as he would an English Act of Parliament. But the only material question upon this Act of Congress is, whether it applies to the case of the Defendant, and it is said to be very far from clear that he is "a person holding an office or agency under the government of the so-called *Confederate States of America* either national, state, or municipal," within the 5th Article of the Act. As to this point, however, the Plaintiffs have themselves put their own interpretation upon the Act, for it is stated in the plea, and is admitted, that by virtue of the Act of Congress proceedings *in rem* have been instituted to secure the condemnation of the Defendant's property, on the ground of his being one of the persons specified in the Act whose property is liable to confiscation. It appears to me that it is not competent to

(1) 10 H. L. C. 624.

the Plaintiffs, while thus proceeding, to allege in reply to the Defendant's objection to answer, that the Act of Congress does not apply to his case, and that, consequently, he is exposed to no risk of forfeiture.

The case, therefore, stands thus:—The *United States*, to whose existing law of forfeiture the Defendant is alleged to have rendered himself amenable, are proceeding against him to obtain from him an account of moneys and goods which have come into his possession in the very character of agent to the *Confederate States* by which his landed property in the *United States* has become liable to forfeiture. He cannot state any of the circumstances connected with his agency without his answer having a tendency to expose him to the forfeiture. It is a case entirely distinguishable from *King of the Two Sicilies* v. *Willcox* (1). There it was not shewn that the Defendants had rendered themselves liable to criminal prosecution. Here the plea alleges the particular ground of liability to forfeiture, and that proceedings have actually been taken and are pending to enforce it. There it was doubtful whether the Defendants would ever be within the reach of a prosecution, and their being so depended on their voluntary return to their own country. Here the subject of the forfeiture is within the power of the *United States*, and the proceedings against the Defendant will be equally effectual whether he remains here or returns to the country where his property is situate.

Under these peculiar circumstances I cannot distinguish the case in principle from one where a witness is protected from answering any question which has a tendency to expose him to forfeiture for a breach of our own municipal law. The *United States* coming into our Courts must be subject to every rule of evidence which prevails in them, and, amongst others, to that which protects a witness from exposing himself to penalties by his answer. And it appears to me that it would be most unjust not to extend this protection to a case where the party seeking the disclosure has the power to proceed for the forfeiture and the means of enforcing it. I am of opinion that the plea, so far as it applies to the discovery, must be allowed.

(1) 1 Sim. (N.S.) 301; 15 Jur. 214.

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Before proceeding to consider the plea as it applies to the relief prayed by the bill, I must notice an objection which was made by the Defendant to my entering upon this question at all after holding the plea to be good to the extent which has been just stated. It was contended that if the Plaintiffs are not entitled to a discovery their right to relief must fail, because (as I understood the argument) there would be nothing left for equity, as the Plaintiffs might obtain the remaining objects of their bill by an action at law. But I think this objection is not maintainable. What the Plaintiffs seek by their bill is an account—and nothing appears upon the face of the bill to shew that it is not fit for equity, so that the question is not open to the Defendant upon this plea. Why, then, the Plaintiffs should lose their right to have an account because they are deprived by the Defendant's own objection of part of the evidence by which they proposed to establish their case, I am at a loss to understand, and the plea is therefore open to further consideration.

The Vice-Chancellor held that the plea was good to bar the right to the relief sought by the bill, because, from the matter which it disclosed, the Plaintiffs were not entitled to institute the suit against the Defendant without waiving the forfeiture for which they were proceeding against him in *America*. The rule upon which His Honour proceeded, and which he considered to be applicable to the case, is the trite and familiar one that "he who seeks equity must do equity;" and in support of the Vice-Chancellor's judgment it was contended before me that the Plaintiffs were, on the one hand, insisting that the Defendant, as agent to the *Confederate Government*, was to account to them; and on the other, that in respect of that very agency they were seeking to take away the whole of the property; that it therefore came within the principle of those cases in which the Court has held that a person cannot claim both a debt and a penalty in respect of the same subject matter, and illustrations of the rule in question were drawn from proceedings for tithes or for waste.

Before proceeding to decide upon the application of the rule or maxim, it will be right to ascertain its precise limit and extent; and it will, I think, be found, both upon principle and from authority, that the equity to be observed by a person seeking

equity must be some equity which is involved in the subject of the suit. The boundaries of the maxim were very clearly defined by that most able and careful Judge Vice-Chancellor *Wigram*, in the case of *Hanson* v. *Keating* (1), and his definition was adopted by an equally able and careful Judge, Lord Justice *Turner*, in *Gibson* v. *Goldsmid* (2).

Vice-Chancellor *Wigram* said: "The rule decides, in the abstract, that the Court giving the Plaintiff the relief to which he is entitled, will do so only upon the terms of his submitting to give the Defendant such corresponding rights (if any) as he also may be entitled to in respect of the subject matter of the suit." And again: "A party does not, by becoming Plaintiff in equity, give up any of his rights, or submit those rights to the arbitrary disposition of the Court. He submits only to give the Defendant his rights in respect of the subject matter of the suit, on condition of the Plaintiff obtaining his own." And Lord Justice *Turner* said: "The rule does not go so far as to entitle the Court arbitrarily to impose terms upon a Plaintiff who may be driven to ask for its assistance. It is restricted in its operation; and the true meaning of it, as I apprehend, is this, that those who ask for the assistance of the Court must do justice as to the matters in respect of which that assistance is asked."

All the illustrations which the Vice-Chancellor employed in support of his opinion that the Plaintiffs must do equity by waiving the forfeiture fall precisely within the limits of the rule as above expounded. Take the case of waste—the Plaintiff could not file a bill for a discovery and account without waiving his right to an action for treble damages. Why? Because he wanted the assistance of equity, and equity would not assist him except upon condition of his foregoing his right to resort to a severe proceeding to recover a penalty. This is clearly an equity which is exacted in respect of the identical subject matter of the suit. So in the case of tithes, the tithe-owner filing a bill for the single value of the tithes, was formerly compelled to waive the treble value in his bill, but afterwards the filing of the bill was held to be an implied waiver. This shews most plainly that the equity required to be done was involved in the suit itself.

(1) 4 Hare, 1, 5, 6. (2) 5 D. M. & G. 757, 765; 1 Jur. (N. S.) 1, 4,

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What is the ground of relief sought by the present bill? It is to obtain money and goods belonging to the Plaintiffs in the hands of the Defendant, which he admits to be their absolute property. The Vice-Chancellor, adopting the argument and the language of Mr. *Benjamin*, says: "The Plaintiffs say, on the one hand, 'Give us all the moneys which you have acquired by the agency,' and, on the other, 'Give us all your estate and property because you have acted as agent.'" The proposition of the Plaintiffs is not here stated with perfect accuracy, for they do not ask for moneys which the Defendant has acquired by the agency, but for moneys admitted to be their property which the Defendant has in his hands, and which he holds for them. The Defendant has no colour of right to keep this property from the Plaintiffs, nor does he pretend to the slightest claim upon it. But he says, by reason of the agency through which the property came into my hands I have exposed myself to the forfeiture of my property in *America*, and you ought not to be allowed to obtain your own property without abandoning the endeavour to procure the forfeiture of mine. What connection is there between the demand of their own property by the Plaintiffs and the forfeiture of the Defendant's by a totally different proceeding? Prior to any proceeding either here or in *America*, were not the *United States* entitled to their own property, and also to proceed against the Defendant for an infraction of their law?

It is said that the agency of the Defendant is the foundation of the proceedings in both instances. But this is not correct. The present suit is not instituted in respect of the agency of the Defendant. The statement of his agency to the *Confederate States* is merely descriptive of the way in which the money and goods came into the Defendant's hands, and the Plaintiffs would have been entitled to them in whatever character they were received by him. The Vice-Chancellor says the Plaintiffs are actively insisting upon a claim against the Defendant, while they are seeking equitable relief here on the same grounds. But I am at a loss to perceive the similar grounds of the two proceedings. In the one, the Plaintiffs say: "Give an account of our money and goods of which you have possessed yourself." In the other—"Answer to the charge of having acted in a particular character or employ-

ment which renders you liable by our law to a forfeiture of your lands." Can it be within the rule of equity upon which the Vice-Chancellor proceeded, that the Defendant should be allowed to say: "I will not give you your property, which I have not a shadow of right to retain, unless you will waive a prosecution to which I am exposed solely because the employment which constitutes my offence was the means by which I got possession of your property."

Suppose, before any bill had been filed by the *United States*, they had prosecuted the Defendant to conviction, and had obtained a forfeiture of his property, and that they afterwards came to the Court claiming, as they do now, to have an account of their property. Would the Court have said to them—"No! you have chosen your remedy: you have got the Defendant's estate by means of a penal proceeding, and, therefore, he may keep your property, and we will give you no relief." There can be but one answer to the case put in this way, and yet, if the Vice-Chancellor is right in saying that the suit and the prosecution are on the same grounds, a plea in bar ought equally to be allowed in the case I have supposed as in the present.

It appears to me that to hold with the Vice-Chancellor in this case would be stretching the rule of equity upon which he founded himself beyond its proper limits: that the examples of the application of the rule on which he relied were instances where the party had a double remedy, as in tithes and waste: that in this case the Plaintiffs have not a double remedy for the same thing, but distinct and separate claims and demands for different things, and the equity sought and the equity required of the Plaintiffs have no relation to, or connection with, each other.

I am of opinion that the plea of the Defendant is not a good plea in bar to the relief sought by the bill.

It was argued on the part of the Plaintiffs that if the plea was bad as to any part of it, it must be entirely set aside. But that is not so. A plea to a bill in equity may be good in part and bad in part, and accordingly, as Lord *Redesdale* says in his treatise (1), may be allowed in part, and overruled in part, but he adds: "yet there does not appear any case in which two defences offered

(1) 5th Ed. p. 343.

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by a plea have been separated, and one allowed as a bar." That is not the present case, for here there is one defence offered to the whole bill, the entire plea being good as to the part of the bill which calls for an answer, and bad as it applies to the relief which it prayed. It was admitted on both sides that the case is entirely new, and that there is no precedent to direct me to the proper mode of dealing with this plea. I think the course suggested by Mr. *Marten* will be the best for me to adopt; and I shall accordingly allow the plea as to the discovery—overrule it as to the relief, leaving the Defendant at liberty to put in a voluntary answer.

Solicitors for the Plaintiffs: Messrs. *Field, Roscoe, & Francis.*
Solicitors for the Defendant: Messrs. *Thomas & Hollams.*

FORSBROOK *v.* FORSBROOK.

L. JJ.
1867
Nov. 11;
Dec. 5, 11.

Will—Construction—Estate Tail—Rule in Shelley's Case—Cy-près—Practice—Special Case—Jurisdiction as to future Rights—13 & 14 *Vict. c.* 35, *ss.* 11, 14.

A testator declared his will to be, that his property be inherited by his nephews, *C.* and *T.*, and the sons of his late brother *A.* during their lives, and after the decease of *C.* and *T.* that the eldest son of *C.* and the eldest son of *T.* inherit the said property during their lives, and so on, the eldest son of each of the two families to inherit the same for ever; and that each two of the succeeding inheritors should inherit the said property free from incumbrances:—

Held (reversing the decision of *Stuart*, V.C.), that *C.* and *T.* took estates for their lives, with remainder to their eldest sons respectively for their lives, with remainder to *C.* and *T.* in tail male.

Where the interests of the parties to a special case were not of such a nature as to give the Court jurisdiction to decide the questions asked in the case, the Court gave permission to amend the case by introducing a question as to the right of the Plaintiffs to commit waste in order to give the Court jurisdiction.

THIS was an appeal from a decision of Vice-Chancellor *Stuart* upon a special case relating to the construction of the will of *John Forsbrook* (1).

The testator, by his will, dated the 23rd of October, 1863, after giving an annuity of 10*s.* a week to his daughter *Sarah Brown*, proceeded as follows:

"It is my will, after the decease of my brother *William Forsbrook* and my daughter *Sarah Brown* that my aforesaid real and personal property be inherited by my nephew *Charles Forsbook* son of my late brother *Matthew Forsbrook* and my nephew *Thomas Forsbrook* son of *Benjamin Forsbrook* and the sons of my late brother *Thomas Forsbrook* during their lives, and after the decease of my aforesaid nephew *Charles Forsbrook* and after the decease of my aforesaid nephew *Thomas Forsbrook* it is my will that the eldest son of the aforesaid *Charles Forsbrook* and the eldest son of the aforesaid *Thomas Forsbrook* inherit the aforesaid property during their lives and so on the eldest son of the two families of the name of *Forsbrook* to inherit the aforesaid property for

(1) The case is reported, Law Rep. 2 Eq. 799.

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ever; and that each two of the succeeding inheritors shall have my aforesaid property and inherit it free from any incumbrance whatever; and that the houses of my aforesaid property shall be kept in tenantable repair and have two coats of paint on outside every fourth year. It is my will that each succeeding two inheritors of the name of *Forsbrook* shall see that the two who inherit the aforesaid property shall keep the aforesaid property in good and proper repair and have it painted as aforesaid; if neglected the succeeding inheritors shall have full power to receive all rents and profits arising from the aforesaid property."

The testator died on the 12th of May, 1864; at that time the nephew *Charles* had an eldest son, *W. H. Forsbrook*, and the nephew *Thomas* an eldest son, *J. T. Forsbrook*.

By an indenture of the 18th of May, 1865, to which nearly all the members of the family were parties, *William Forsbrook*, the testator's brother, being therein described as the protector of the settlement, the estate was conveyed to *Joseph Bloomfield*, to hold the same discharged of the estates in tail male or in tail of *Charles Forsbrook* and *Thomas Forsbrook*, the sons of the testator's brothers, *Matthew* and *Benjamin*.

Disputes having subsequently arisen as to the true construction of the will, a special case was prepared for the opinion of the Court, under the 13 & 14 Vict. c. 35, in which *Charles Forsbrook* and *Joseph Bloomfield* were Plaintiffs, and *W. H. Forsbrook*, the eldest son of *Charles*, and *J. T. Forsbrook*, the eldest son of *Thomas*, were Defendants. The questions proposed for the opinion of the Court were:—

1. What estates or interest did *Charles Forsbrook* and *Thomas Forsbrook*, the testator's nephews, respectively take under the will, and what estates have they under the indenture of the 18th of May, 1865?

2. How are the costs to be provided for?

The Vice-Chancellor was of opinion that the two nephews took estates for life with remainders to their eldest sons respectively in tail male. From this decision the Plaintiffs appealed. When the appeal was opened before the Lords Justices, their Lordships took the objection, that, inasmuch as the Plaintiffs were undeniably entitled to the possession of the property, there was

no matter at present in dispute which would give the Court jurisdiction to decide the questions proposed in the special case. They referred to the 11th and 14th sections of the 13 & 14 Vict. c. 35.

Mr. *W. Pearson*, for the Plaintiffs :—

The question proposed to the Court relates to the power which the Plaintiffs have of dealing with the estate, which is a matter of present interest. It is not necessary for me to shew that the point could arise in the same form in a suit between the same parties; nor is it necessary that it should arise in a suit instituted by the same Plaintiffs against the same Defendants and no others. It is sufficient that it might arise in a suit respecting this property in which all the present parties would be parties either with or without others. This question, as to the extent of the Plaintiffs' interest in the property, would arise in a suit to redeem a mortgage, or in a suit for the administration of the testator's estate, or in a suit by the remaindermen to restrain the tenants in possession from committing waste: *Lady Langdale* v. *Briggs* (1); *Webb* v. *Byng* (2); *Earl of Tyrone* v. *Marquis of Waterford* (3); *Greenwood* v. *Sutherland* (4); *Fletcher* v. *Rogers* (5); *Garlick* v. *Lawson* (6); *Gosling* v. *Gosling* (7); *Bell* v. *Cade* (8).

The Court will, if necessary, give leave to amend the special case by inserting such a question as will give the Court jurisdiction. In the present case a question respecting the right of the Plaintiffs to commit waste would be sufficient.

Mr. *Eddis*, for the Defendants, did not oppose the proposal for amendment.

The Lords Justices gave permission to amend the case by inserting a question whether the Plaintiffs were entitled to commit waste; and the arguments on the main question then proceeded.

Mr. *W. Pearson*, in support of the appeal :—

We contend that the effect of the devise is to give estates in tail male to the testator's nephews, *Charles* and *Thomas*. The rule in

(1) 8 D. M. & G. 391, 426. 2 Jur. N.S. 982
(2) Ibid. 633. 2 Jur. N.S. 1242
(3) 1 D. F. & J. 613. 6 Jur. N.S. 567
(4) 10 Hare, App. xii.
(5) 10 Hare, App. xiii.
(6) Ibid. App. xiv.
(7) Joh. 265. 5 Jur. N.S. 910
(8) 2 J. & H. 122.

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Shelley's Case (1) is a rule of law, not dependent on the construction of the particular will, nor upon the intention of the testator. It is binding, even though the result contradicts the intention of the testator. Whenever an estate for life is given to the ancestor, and an estate of inheritance to the issue, the estates necessarily coalesce. Nor is the rule affected by the ancestors being joint tenants, and the issue having several inheritances. The only question here is whether the words "eldest son" are words of limitation. Those words were so construed in *Doe* v. *Garrod* (2), and in like manner "son," "child," and "issue," in the following cases: *Robinson* v. *Robinson* (3); *Chorlton* v. *Craven*, cited in *Mellish* v. *Mellish* (4); *Lewis* v. *Puxley* (5); *Reece* v. *Steel* (6); *Mortimer* v. *West* (7); *Wollen* v. *Andrewes* (8); *Murthwaite* v. *Jenkinson* (9); *Smith's Fearne's* Contingent Remainders (10).

In the present case, it is clear that in the second place in which the expression occurs, the words can have no other meaning than the eldest male issue, and it follows that they ought to have the same signification in the first place.

The effect of the Vice-Chancellor's decision, by which the eldest sons of the two nephews are made the *stirpes* of the succession, would be, that if the issue male of the eldest sons were to fail the estate would go over, although there might be issue male of the younger sons of the nephews in existence, which would be clearly contrary to the testator's intention.

Mr. *Eddis*, for the Defendants:—

The rule in *Shelley's Case* is never applied so long as no difficulty of construction or danger of an intestacy arises. In the present case there is no difficulty until after the estates for life given to the eldest sons. Although the words "eldest son" should be considered words of limitation in the second part of the devise, it does not follow that they are so in the first part, where there is no necessity for such a construction. *Primâ facie* "son" is a word of designation, and it is only held to be a word of limitation where,

(1) 1 Rep. 219.
(2) 2 B. & Ad. 87.
(3) 1 Burr. 38.
(4) 2 B. & C. 524.
(5) 16 M. & W. 733.
(6) 2 Sim. 233.
(7) Ibid. 274.
(8) 2 Bing. 126.
(9) Sug. R. P. 258.
(10) Vol. ii. p. 268.

by so doing, an intestacy is avoided. There is no case in which the words "eldest son" have been held to be words of limitation where there has been an express life estate given to him.

There is nothing unreasonable in making the eldest sons the *stirpes* of the families, for there is nothing to shew that the testator included under the word "family" all the descendants of the two nephews. His intention will be fully carried out by giving the estates tail to the eldest sons.

Mr. *W. Pearson,* in reply.

LORD CAIRNS, L.J.:—

In this case I think that a clear and precise construction ought to be given to all parts of the will, and that this can be done by giving every word its natural and proper meaning. The first devise is in these words: "It is my will that my real and personal property be inherited by my nephew *Charles Forsbrook* son of my late brother *Matthew Forsbrook,* and my nephew *Thomas Forsbrook* son of *Benjamin Forsbrook,* and the sons of my late brother *Thomas Forsbrook,* during their lives." Stopping here, there can be no doubt that the will gave to the devisees joint estates for their lives in the whole property. The will then proceeds: "After the decease of my aforesaid nephew *Charles Forsbrook* and after the decease of my aforesaid nephew *Thomas Forsbrook* it is my will that the eldest son of the aforesaid *Charles Forsbrook* and the eldest son of the aforesaid *Thomas Forsbrook* inherit the aforesaid property during their lives." Stopping again there, the natural meaning of the words is, that the two persons designated as the eldest sons should inherit the property for their lives only, and it seems to me impossible to enlarge those words into words of limitation. There is no authority for saying that a devise to *A.* for life, without a great deal more, can be enlarged into an estate of inheritance in *A.* The testator then says: "And so on the eldest son of the two families of the name of *Forsbrook* to inherit the aforesaid property for ever." These last words clearly indicate a series of inheritances, and constitute words of limitation. I think also that the mention of one inheritor taking from another free of incumbrances, points to a different mode of succession from that by

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which a tenant for life takes from a preceding tenant for life. Then the words "the eldest son of the two families" clearly mean the eldest son for the time being; and the only question of difficulty is, to what *stirps* the words of inheritance are to be referred—whether to the nephews or to their eldest sons? If the words are to be referred to the eldest sons, it might happen that they might die without issue, and the younger sons might have issue, and so there would be two families of the name of *Forsbrook*, consisting of numerous members—the very state of things contemplated by the testator—and yet by the construction which is sought to be put upon the will the property might have gone over to the heirs-at-law of the testator, who may not bear the name of *Forsbrook*. Such a construction would, as it appears to me, defeat the intention of the testator. If, on the other hand, we make the nephews themselves the *stirpes* of the families, no such consequences will ensue. The eldest sons succeed to the estates for life, and the nephews are able to transmit the property to all the members of the family, and thus we give effect to all the words of the will, and carry out the intention of the testator. This construction entirely agrees with the principles laid down by Lord *Denman* in *Doe* v. *Gallini* (1), in which an estate tail in remainder was given to the first line of takers in order to include every member of the family. The decree of the Vice-Chancellor must, therefore, be varied.

5 Ch D. 188

We have already said that the special case must be amended by stating that the first takers desire to know whether they have power to commit waste, and the answer to the question must be that they are not so entitled.

The answer of the question as to the costs will be the same as in the Court below.

SIR JOHN ROLT, L.J.:—

I am of the same opinion. I think that effect may be given to all the words of the will without having recourse to the doctrine of *cy-près*. I think that the words "the eldest sons of *Charles Forsbrook* and the eldest son of *Thomas Forsbrook*," are words of purchase, giving them respectively estates for life only, and that

(1) 5 P. & Ad. 621; 3 Ad. & E. 340.

there is nothing in the context which requires that estate to be enlarged. But it does not necessarily follow that the testator wished to give estates for life to the next generation, and when he goes on to say, "and so on the eldest son of the two families of the name of *Forsbrook* to inherit the aforesaid property for ever; and that each two of the succeeding inheritors shall have my aforesaid property and inherit it free from any incumbrances," he clearly indicates estates of inheritance, because they are to take free from incumbrances. If the estates were only for life, such a direction would have been unnecessary. Then I think the "two families" mean the families of *Charles* and *Thomas*, not of their eldest sons. The testator is pointing to an estate of perpetuity in the two families of the name of *Forsbrook*, and it is reasonable to suppose that he meant the families of his two nephews, and not of their eldest sons. I take the words "eldest son" in that clause to mean the eldest son for the time being, so that if the issue of the present eldest son of *Charles* or *Thomas* fails, the estate should go back to the second son. The result is, that there will be an estate for life to the nephews *Charles* and *Thomas*, and the sons of the testator's brother *Thomas*, with remainder to the eldest sons of the nephews, *Charles* and *Thomas*, for life, and then you go back to the *stirpes*, *Charles* and *Thomas*, and give them an estate in tail male. The same result would be arrived at if we held it to be a perpetual succession of life estates—which we might have done if it had not been for the direction respecting incumbrances—and then applied the doctrine of *cy-près*, which would give the nephews an estate in tail male.

Solicitor for the Plaintiffs: Mr. *Letts*.
Solicitor for the Defendants: Mr. *W. H. Reece*.

L. JJ. 1867 Nov. 12.

ATTORNEY-GENERAL *v.* MID-KENT RAILWAY COMPANY AND SOUTH-EASTERN RAILWAY COMPANY.

Mandatory Injunction—Statutory Obligation—Railway Company—Defence of Public Convenience.

18 Eq 746
24 Ch D 186

A local board of health withdrew its opposition to a railway bill upon the insertion in the Act of a clause providing that no bridge carrying a road over the railway within their district should have an approach with a slope of more than 1 in 30. The making a slope of 1 in 30 required an encroachment on the land of a person who obtained an injunction to prevent such encroachment, and the company thereupon made a bridge with a slope of 1 in 20:—

Held (reversing the decision of *Stuart*, V.C.), that the company must not have a bridge with a slope of more than 1 in 30, and that it was no answer to say that this requisition could not be complied with without stopping the railway.

The principles of the Court as to granting mandatory injunctions considered, with reference to the difference between cases of nuisance and cases of contract, and to the suit being by an individual or by the Attorney-General.

THIS was an appeal from an order of Vice-Chancellor *Stuart* dismissing the information.

In 1862 the *Mid-Kent Railway Company* applied for an Act for making a railway to *Addiscombe*, and were opposed by the *Croydon Local Board of Health*, which only withdrew its opposition upon the following clause being inserted in the Act (*The Mid-Kent* (*Addiscombe*) *Railway Act*, 1862):—

12. "Every bridge to be erected by the company for carrying a road over the railway, and the approaches thereto, in the parish of *Croydon*, shall have a clear space between the fences of the same of not less than 30 feet, and the ascent to such bridges shall not exceed 1 in 30."

In the year 1863 the company proceeded to carry a road in the parish of *Croydon*, leading from the *Black Horse* towards *Norwood*, over the railway, by means of a bridge constructed with approaches according to sect. 12 of the Act. In raising the road they made an embankment which encroached upon a strip of land at the side of the road which, as it turned out, was not delineated in the plans or described in the books of reference. A Mr. *Teevan*, the owner of this land, filed a bill for an injunction to restrain the company

from interfering with it, and an injunction was granted on the 3rd of July, 1863.

The company thereupon shortened the embankment so as not to interfere with Mr. *Teevan's* ground. This necessitated an increase of inclination, to what extent was disputed, but the Defendants admitted the slope to be as much as 1 in 20.

On the 23rd of October, 1863, the clerk of the board of health wrote to the solicitors of the *Mid-Kent Railway Company* requiring them to alter the slopes, so as to make them conformable to the Act. The solicitors of the company acknowledged the receipt of this letter, but made no further reply. During the next twelve months six more letters were written by the board to the solicitors of the company, in one of which a suggestion was made as to the company coming to an arrangement with Mr. *Teevan*. No answer was returned till the 28th of October, 1864, when a letter was written by the solicitors of the company stating, in effect, their willingness to make the alteration if an arrangement with Mr. *Teevan* as to his ground could be carried into effect; and in subsequent letters they stated that they could not make the alteration, as Mr. *Teevan* insisted on his injunction, and would not allow his ground to be interfered with.

By an Act of 1864 an agreement made in May, 1863, for an amalgamation of the *Mid-Kent Railway Company* with the *South-Eastern Railway Company* was confirmed.

In March, 1865, the information was filed at the relation of the clerk of the local board of health, and on the 21st of June, 1866, was dismissed without costs by Vice-Chancellor *Stuart*.

Mr. *Bacon*, Q.C., and Mr. *W. W. Cooper*, for the Appellant:—

The company must be held to their bargain, and the difficulty and expense of making the alteration, and the possible inconvenience to the public who use the railway, are no answer: *Raphael* v. *Thames Valley Railway Company* (1).

Mr. *Dickinson*, Q.C., and Mr. *Phear*, for the *South-Eastern Railway Company*:—

The injury is too trifling to induce the Court to grant a manda-

(1) Law Rep. 2 Ch. 147.

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tory injunction when the work has been completed: *Durell* v. *Pritchard* (1).

[The LORD JUSTICE ROLT:—A distinction has been drawn between cases of nuisance and cases of contract: *Rochdale Canal Company* v. *King* (2).]

There is a sufficient remedy at law by mandamus: *Reg.* v. *London and Birmingham Railway Company* (3); *Reg.* v. *Manchester and Leeds Railway Company* (4); so the case should be left to law.

[The LORD JUSTICE LORD CAIRNS:—The argument usually has been, that a case is one where damages are a sufficient remedy, and that, therefore, it should be left to law.]

There has been great delay.

[The LORD JUSTICE LORD CAIRNS:—Delay appears more important where what is complained of is a mere encroachment, to which the party aggrieved may not care to object, than in a case of breach of contract, where the views of the other party are known from the terms of the contract.]

What the Court is asked to do here is what it has never done—to decree specific performance of an obligation imposed by statute. The proper remedy in such case is by mandamus; specific performance being granted only where there is not an adequate remedy at law. The case of *Attorney-General* v. *Sheffield Gas Consumers' Company* (5) shews the principles of Courts of equity as to cases of this nature. What the Defendants are asked to do is an impossibility.

[The LORD JUSTICE LORD CAIRNS:—You can alter the levels of your line, or apply for parliamentary powers to acquire fresh land.]

LORD CAIRNS, L.J.:—

We are asked to dismiss this appeal on the ground that the injury complained of is trifling. I think the bare statement of the facts shews the injury not to be trifling, but the case of the informant is rendered much stronger if we consider that under the

(1) Law Rep. 1 Ch. 244. 12 Jun 1866 (3) 1 Railw. Cas. 317.
(2) 2 Sim. (N.S.) 78. (4) Ibid. 523.
(5) 3 D. M. & G. 304. 17 Jun 677

Railways Clauses Act, 1845, the approach could have been made with any inclination not greater than 1 in 20, and that the Legislature, by a special clause, provided that, in the present case, it should not exceed 1 in 30. Parliament, therefore, must have considered that the General Act did not, in the circumstances of this case, give sufficient protection, and I think, accordingly, that the Defendants have violated not only the letter but the spirit of the special enactment.

It was pressed upon us that there was a sufficient remedy at law by mandamus, and that where there is a sufficient remedy at law this Court does not interfere by way of injunction. It is true that in many cases where the injury has been trifling, where there has been improper delay, or where the injury is transitory, this Court has left the complainant to his remedy at law. That was on the ground that there were two concurrent remedies, an action for damages and a suit for an injunction, and that damages would meet the justice of the case. Here the argument is, that the Attorney-General could obtain from a Court of law a mandamus having the same effect as a mandatory injunction, and that we are to refuse to interfere in a case where the Court clearly has jurisdiction, merely because the same relief can be had in another Court.

As regards delay, the board of health, as it appears to me, have shewn that they were not willing to embark in litigation if they could avoid it, but have not been guilty of any such delay as can prejudice their rights.

It was urged before us that the decree in Mr. *Teevan's* suit makes it impossible for the company to do what is asked. That is a matter with which the Attorney-General has nothing to do. Mr. *Teevan* has obtained an injunction to prevent the company from trespassing on his land. The company may come to terms with him if they can; but if they cannot, and are unable to comply with the Act without closing their railway, much as such a result may be to be regretted, they must close it.

SIR JOHN ROLT, L.J.:—

I am of the same opinion. I have seldom seen a case shewing more forcibly the necessity of compelling railway companies to

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keep within their powers. They have important powers and duties, and are entitled to every consideration when they are acting within their powers; but it is most important that they should not be allowed to exceed them. In the present case repeated letters were written, asking the company to do what it was their duty to do. They take no notice of them for months, and when, at last, they send a reply, they treat their obligations as depending upon the question whether they can come to an arrangement with Mr. *Teevan*, as if the dispute were only between him and them.

It was contended on behalf of the Appellants that we were to look at this merely as a case of nuisance, and that it was disposed of by *Durell* v. *Pritchard* (1). The Lords Justices never intended to lay down in that case that nothing was to be looked to but the amount of damage; even if the case were one merely of nuisance all the circumstances must be taken into consideration. But there is a manifest distinction between cases depending on nuisance and those depending on contract. It is shewn by the case of the *Rochdale Canal Company* v. *King* (2), and many other authorities, that where there is a contract, the Court cannot attach the same importance to the question whether the damage is serious or not, as it does in mere cases of nuisance, but that the main point is whether the contract has been broken.

It was said, however, that here, although there was a contract, yet, as the injury was small and the works complete, the remedy was only at law. I doubt whether the injury is small. I am disposed to consider it substantial, and I do not think the case one that ought to be left to law on the ground that damages are an adequate remedy. Assuming that there is a complete remedy at law, by mandamus, that does not oust the jurisdiction of a Court of equity, even where a subject is suing for his individual rights. Here the Attorney-General is suing in a matter of public interest, and it is a question whether he is not entitled to elect in which Court he will sue. This question was raised in *Attorney-General* v. *Brown* (3), though not formally decided.

Upon the whole, the case appears to me to be one in which the

(1) Law Rep. 1 Ch. 244; 12 Jur. N.S. 116. (2) 2 Sim. (N.S.) 78.
(3) 1 Sw. 265.

railway company must be restrained from keeping the approach in a state not according to the Act. They say that it is impossible for them to make it conformable to the Act, inasmuch as it cannot be so made without using land which they have no power to take. That is a difficulty which they must get over as they best can, but it furnishes no answer to the information. A decree must be made according to the prayer of the information, with costs.

Mr. *Bacon* asked for the costs of the appeal, but the Court declined to give them.

Solicitor for the Information: Mr. *T. Tayloe.*

Solicitor for the *South-Eastern Railway Company*: Mr. *John Freeland.*

In re BARNED'S BANKING COMPANY.
Ex parte THE CONTRACT CORPORATION.

Power of Limited Company to hold Shares—Transfer in blank—Registration of Company as Shareholder after Commencement of its Winding-up—Companies Act, 1862, *s.* 153.

A limited company may become a shareholder in another limited company, if authorized by its own memorandum and articles of association to do so.

A transfer was executed by *P.* to company *C.* of shares in company *B.* The intention of both parties was, that *P.* should transfer and company *C.* accept all the shares which *P.* held. At the time when *P.* executed the deed and handed it to his agent, it contained no description of the shares. Before it left his agent's hands it was filled up with the number of the shares, being all *P.'s* shares, and with the description of them as shares in company *B.*, but the denoting numbers of the shares were not inserted. The seal of the *C. Company* was then affixed to it. The denoting numbers of the shares and the date of the transfer were afterwards filled in, it was handed in for registration, and the *C. Company* were registered as shareholders:—

Held, that the transaction was not invalidated by the fact of the deed of transfer having been executed in an incomplete form, and that the *C. Company* were liable as shareholders.

The seal of the *C. Company* was affixed without any resolution of the board of directors, but by the direction of the three persons who had the chief management of the affairs of that company:—

Held, that it must be considered as affixed by due authority.

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Banking Co.
Ex parte
The
Contract
Corporation.

After the deed of transfer had been sent in for registration, but before it had been registered, the winding-up of the *C. Company* commenced:—

Held, that the validity of the registration of the *C. Company* as shareholders was not affected by the *Companies Act*, 1862, s. 153.

THIS was an appeal by the official liquidator of the *Contract Corporation, Limited,* from a decision of the Master of the Rolls, who had fixed the name of the corporation on the list of contributories to *Barned's Banking Company,* as a contributory in respect of 368 shares.

The *Contract Corporation, Limited,* was incorporated in the month of January, 1864. The memorandum of association stated as one of its objects: "To purchase or accept any obligations, bonds, debentures, notes, and shares in any foreign or English company, and to negotiate the sale of any such securities." The 47th clause of the articles authorized the directors to invest any of the moneys of the corporation on such securities, other than the shares of the corporation itself, as the directors might think desirable.

In June, 1865, the partners in a private bank in *Liverpool,* trading under the name of "*J. B. Barned & Co.,*" proposed to convert the concern into a joint stock company. The *Contract Corporation* agreed with the then partners in the bank to assist them in having this done upon terms which were arranged between the partners on the one hand, and Mr. *Rixon,* representing the *Contract Corporation, Limited,* on the other hand. One of the terms was, that the *Contract Corporation* should apply for 10,000 shares in the projected company, in such names as might be found convenient. The *Contract Corporation* accordingly applied for 10,000 shares in the names of some of its directors, and of some other persons who appeared to have been agents or friends of the directors. One application was in the name of Mr. *Piercy* for 500 shares, and after the registration of the new company an allotment on that application was made to him of 368 shares, which were registered in his name. They were the shares which gave rise to the present question.

There was no dispute that in this transaction *Piercy* was merely a trustee for the *Contract Corporation.* A letter of request was written from the corporation to him, requesting him to allow his

name to be used, and a letter of indemnity against any liability was given to him. The deposit and the call were paid out of the funds of the *Contract Corporation*. A letter was signed by *Piercy*, and by each other nominee, addressed to the corporation, agreeing to hold the shares allotted to each of them in trust for the corporation, and undertaking "to transfer them, whenever required, to you" (that is to the *Contract Corporation*) "or your nominee or nominees."

Mr. *Piercy* afterwards executed a transfer of these shares to the *Contract Corporation*, under the circumstances and in the manner stated below, and the question was, whether this transfer effectually divested the shares out of him and vested them in the corporation.

The old firm of *Barned & Co.*, the private bank, continued to use that name for some time longer in the liquidation of their affairs. Mr. *Mozley* was the partner representing this firm in the transaction, and in the summer or autumn of 1865 a fresh arrangement was come to between *Mozley*, representing this firm in liquidation, and the *Contract Corporation*, by which *Mozley* agreed to take and hold 6118 of the 10,000 shares which had been allotted to the nominees of the *Contract Corporation* on joint account of the firm of *Barned & Co.* in liquidation, and of the *Contract Corporation*, on certain terms which it is unnecessary to mention. This new arrangement led to *Mozley* desiring to have the control of the 6118 shares, and to have transfers executed of them. The shares allotted to *Piercy* were part of the 6118.

The secretary and manager of the *Contract Corporation* was Mr. *Handfield*. Mr. *Overend* was the managing director. The articles of association authorized the directors to appoint one of their number to be managing director, and did not impose any limit on his authority, nor did it appear that on his appointment any limit was imposed upon him, so as to exclude him from exercising any of the powers of the board of directors. Mr. *Rixon* was the solicitor of the *Contract Corporation*, and was also a director, and, as it appeared in evidence, not only in matters of law, but in matters of business, one of the chief advisers of the corporation. *Handfield*, in his evidence, spoke of himself, *Overend*, and *Rixon*, as the executive of the *Contract Corporation*. It further appeared in evidence that when the

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board of directors had decided to take the 16,000 shares in *Barned's Banking Company*, *Rixon*, *Overend*, and *Handfield* were directed to carry the matter out, and that the details for carrying into effect the resolution were accordingly arranged by them. After the modification of this arrangement in the autumn of 1865, which has been referred to above, the following letter was written, on the 2nd of December, 1865, to *Handfield* by *Mozley*, representing the old firm of *Barned & Co.*: "Please let me have a list of those parties, who, as your nominees, hold shares on joint *a/c J. B. & Co. & C. C.*, as I must prepare blank transfers for them to sign in case of accident for our protection. I want your list to check our own." *Handfield* accordingly sent a list of the persons in whose names the 6118 shares had been placed. *Handfield* deposed that at personal interviews which he afterwards had with *Mozley*, the latter expressed his desire to have blank transfers of the 6118 shares executed as a protection; and in consequence of *Mozley's* request, *Handfield* wrote to *Piercy* on the 12th of December, 1865, with a form of transfer in blank as follows: "I forward a blank transfer of shares in *Barned's Banking Company*, which you were good enough to allow to be registered in your name. I shall feel obliged by your signing it in presence of a witness, and returning the same to me. I enclose a stamped envelope."

The transfer enclosed in this letter was, as the letter stated, in blank, containing neither the name of the transferee nor any description of the shares.

Piercy deposed that when he received this transfer he objected to execute it without there being in it the name of a transferee, and accordingly, knowing that the shares were the shares of the *Contract Corporation*, and that he had undertaken to transfer to them or their nominee when called upon, and finding that they named no person to take the transfer, he himself inserted the name of the *Contract Corporation*, and executed the transfer in that way. At the time of its execution, however, he did not appear to have known what the description of the shares was which he was transferring, and when the transfer deed left his hands the particulars of the shares were not filled in. He deposed that he executed it intending and meaning it to be a transfer of all the shares which were in his name in *Barned's Banking*

Company as trustee or nominee of the *Contract Corporation*. The transfer, as so executed by him, was handed by him to Mr. *Whitwham*, who held a power of attorney from him, with instructions to see that the transfer was made perfect in every respect before it was left with the *Contract Corporation* to have their seal affixed. *Piercy* also gave *Whitwham* instructions to obtain a letter, stating that the transfer to the *Contract Corporation* comprised all the shares registered in *Piercy's* name. *Whitwham* took the transfer to the office of the *Contract Corporation*, and brought back a letter written and signed by Mr. *Pilcher*, the then registrar of the *Contract Corporation*, in the following words: "I have to acknowledge the receipt of a transfer of 368 shares in *Barned's Banking Company* to this corporation, the said shares being all that are registered in your name."

Whitwham deposed that he took the deed to the office of the *Contract Corporation* to get it made perfect, and that before he parted with the control of it a description of the shares transferred, as being 368 shares in *Barned's Banking Company*, had been inserted; which description he stated was in the handwriting of *Pilcher*. After this the seal of the *Contract Corporation* was affixed, and one of the points in dispute was, whether it was affixed by proper authority. It appeared from *Handfield's* evidence, upon his being cross-examined, that the seal was locked up by a lock requiring two keys, of which originally the chairman of the company had one and the deputy chairman the other. That this being found inconvenient, one key was left with any one member of the board and the other with *Handfield*. It appeared that when the seal was affixed, it was sometimes done by a resolution of the board entered in the minute books; but that on several occasions it was affixed at the instance of *Overend* and *Rixon*, without any resolution, and that it was affixed to *Piercy's* transfer to the *Contract Corporation* upon deliberation by the managing director, by *Rixon* and *Handfield*.

The deed having had the seal of the *Contract Corporation* affixed, was handed to *Mozley*, and sent in by him for registration, and was registered. In its ultimate form the description of the shares was completed by the addition of "36,883 to 37,250." *Pilcher*, however, deposed that this addition, and also the date of the deed,

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were in the handwriting of the secretary of *Barned's Banking Company, Limited*, and were not in the deed when the seal of the *Contract Corporation* was affixed.

The transfer was duly registered, and the *Contract Corporation* were entered on the register of shareholders as the holders of the shares in question. In the interval between the sending in the transfer for registration and the actual registration, a petition for winding up the *Contract Corporation* was presented, on which an order was subsequently made.

A dividend was declared in February, 1866, and was not paid to *Piercy*, but carried to the credit of the *Contract Corporation* in their account current with *Mozley*.

An order having been made for winding up *Barned's Banking Company, Limited*, the Master of the Rolls decided that the *Contract Corporation* must be on the list of contributories in respect of the above shares, from which decision the official liquidator of the *Contract Corporation* appealed.

Mr. *Baggallay*, Q.C., and Mr. *Swanston*, for the Appellant:—

We contend, 1. That it was *ultrà vires* of the *Contract Corporation* to take these shares. It is not within the scope of one trading corporation to take shares in another: *Joint Stock Discount Company* v. *Brown* (1). 2. There is no authority to shew that one trading company can become a member of another, and we submit it cannot, according to the terms of the Act of 1862. 3. There was no valid transfer to the *Contract Corporation*, there having been no sufficient authority for affixing the seal of that company to the deed of transfer: *Bank of Ireland* v. *Trustees of Evans' Charities* (2); *Darcy* v. *Tamar, &c. Railway Company* (3); *Weeks* v. *Maillardet* (4); *Hibblewhite* v. *M'Morine* (5); *Nation's Case* (6); and the deed having blanks in it when executed by the transferor: *Tayler* v. *Great Indian Peninsula Railway Company* (7); *Sellin* v. *Price* (8). 4. It was against the agreement between *Mozley* and the *Contract Corporation* to put the corporation on

(1) Law Rep. 3 Eq. 139, 150.
(2) 5 H. L. C. 389.
(3) Law Rep. 2 Ex. 158.
(4) 14 East, 568.
(5) 6 M. & W. 200.
(6) Law Rep. 3 Eq. 77.
(7) 4 De G. & J. 559,
(8) Law Rep. 2 Ex. 189.

the register. 5. The corporation was not put on the register till after proceedings for winding it up had commenced; and after the commencement of the winding-up nothing can be done to affect the property of the corporation: *Companies Act*, 1862, s. 153.

Mr. *Cotton*, Q.C., and Mr. *Kekewich*, for the official liquidator of *Barned's Banking Company*:—

1. The memorandum and articles of the *Contract Corporation* authorize the taking of these shares unless the general law forbids it. 2. The general law does not forbid it. There is nothing at common law to prevent one corporation from being a member of another: *Grant* on Corporations (1). The statutes 7 & 8 Vict. c. 110, and 11 & 12 Vict. c. 45, by their interpretation clauses expressly include bodies corporate. If the present Act had intended to alter this it would have said so; but its provisions, though not express on the point, tend to shew that it was not so intended, for companies formed under the earlier Act may register under this Act: sect. 180; and the 49th clause of Table A. to the Act is almost conclusive. 3. No particular forms are required for affixing the seal of a trading corporation, and here the seal of the *Contract Corporation* was affixed by the persons who practically were entrusted with the sole management of its affairs, and must be deemed to have had authority: *Totterdell* v. *Fareham Blue Brick, &c. Company* (2). The fact that the transfer was partly filled up after execution, does not necessarily invalidate it even as a deed: *Hudson* v. *Revett* (3). But the question is not whether as a deed it is valid at law; whether the *Contract Corporation* are contributories is to be determined by sects. 23, 38, 74, of the *Companies Act*, 1862, and having acted on the deed and got registered under it they cannot be heard to complain of informalities. 4. It was no breach of the agreement between *Mozley* and the *Contract Corporation* to put the latter on the register, but if it were, the banking company have nothing to do with that, it is a matter between *Mozley* and the *Contract Corporation*. 5. The 153rd section has no application to a case like the present. The placing the *Contract Corporation* on the register is not a dealing with its property.

(1) Page 5.

(2) Law Rep. 1 C. P. 674.

(3) 5 Bing. 368.

12 Jur N.S. 901

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Mr. *Rigby*, for *Piercy*:—

The statute 1 Vict. c. 73, s. 6, shews that a corporation may be a member of a trading company formed under that Act, with limited liability, and a company formed under that Act can be registered under the present Act. A purchaser of shares cannot escape from the consequences of his contract because he did not intend ever to have the shares registered in his name: *Paine* v. *Hutchinson* (1). Any irregularities in the transfer are waived by acting upon it: *Sheffield, &c. Railway Company* v. *Woodcock* (2).

Mr. *Swanston*, in reply:—

There is a distinction between a company taking shares and holding shares, which is illustrated by *Great Western Railway Company* v. *Metropolitan Railway Company* (3).

Nov. 23. Lord Cairns, L.J.:—

8 Eq 393
13 Eq 631.

The first objection taken to the order under appeal was, that it was *ultrà vires* the *Contract Corporation* to take shares in any other trading corporation, and to apply its funds in payment for those shares. Generally speaking this would be so. It is at first sight beyond the province of one trading corporation to become a shareholder in another, and to apply its funds for that purpose. But here one of the objects of the *Contract Corporation*, as defined by its memorandum of association, was "to purchase or accept any obligations, bonds, debentures, notes, and shares, in any foreign or English company, and to negotiate the sale of any such securities." It appears to me, that in applying for and accepting shares in *Barned's Banking Company* the *Contract Corporation, Limited*, were strictly, and to the letter, complying with and acting within these terms. If it were necessary to make this power still clearer, the 47th clause of the articles of association provides, that the directors may invest any of the moneys of the corporation on such securities (other than the corporation's own shares) as they, the directors, may think desirable, plainly

(1) Law Rep. 3 Eq. 257. (2) 7 M. & W. 574.
(3) 9 Jur. (N.S.) 562.

implying that, although they might not invest their moneys upon the purchase or allotment of their own shares, they might invest them upon the allotment or purchase of shares *ejusdem generis* in other companies.

The second argument was, that even assuming that, according to the constitution of the *Contract Corporation*, it was not *ultrà vires* to invest their money in shares of another trading company; yet that under the Act of 1862 one trading corporation could not become a member of another trading corporation. Now, if that argument is to prevail, it must be upon the words of the Act of Parliament of 1862, because there is no apparent or *primâ facie* objection to a corporation so joining with another corporation in trade. A trading corporation, as we all well know, may enter into trade or partnership along with an individual. There is no reason at common law, so far as I know, why one corporate body should not become a member of another corporate body. Other Acts of Parliament relating to companies appear to assume that corporations may become members of and shareholders in companies. For example, the general Act, the *Companies Clauses Consolidation Act* of 1845, provides, in the interpretation clause, that "shareholder" in that Act shall include a corporation; and the *Chartered Companies Act*, 1 Vict. c. 73, expressly points out that the Crown may grant a charter to a trading corporation, the shareholders in which may themselves be corporate bodies, and whose liability under that charter may be limited. Now, looking to the words of the Act of 1862, it is said, no doubt justly, that they appear throughout to point to persons, and to the executors and administrators of persons, as if the shareholders were all to be persons in their natural capacity. But even in this Act there are traces that the term "shareholder" and the word "persons" must have been intended to be used in a larger sense, for in the 50th and 51st clauses provision is made for the determination of questions of considerable importance by general meetings, and by votes to be given at those meetings, either in person or by proxy, in cases where, by the regulations of the company, proxies are allowed; and on turning to the forms in the schedule, which may be adopted by any company for its regulation, we find, in the 49th clause of Table A., a provision that the instrument appointing a

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proxy shall be in writing under the hand of the appointor; "or if such appointor is a corporation, under their common seal." Form B. contains a similar clause (clause 22), as do also the forms in the schedule to the Act of 1856. It would, therefore, appear to have been in the contemplation of the Legislature that the appointor of a proxy might be a corporation; and inasmuch as the appointor was to be a shareholder, that a shareholder might be a corporate body.

The case, however, does not rest there. The Act of 1862 is an Act amending and consolidating the whole of the prior laws with regard to joint stock companies. Among other Acts of Parliament repealed by the Act of 1862 are 7 & 8 Vict. c. 110 (the *Joint Stock Companies Act* of 1844), and 11 & 12 Vict. c. 45 (the *Winding-up Act* of 1848). The interpretation clause in each of those Acts provided that the word "person" throughout the Act should include bodies politic or corporate, whether sole or aggregate. In the present Act of 1862 there is no interpretation clause, but sect. 180 and the following sections provide that companies formed under the repealed Act of the 7 & 8 Vict. c. 110, and under the *Chartered Companies Act*, 1 Vict. c. 73, may be registered under this Act of 1862, and that before registration they must send in a list shewing the names, addresses, and occupations of all persons who on a certain day were members of the company, and when so registered they are to become subject in every respect to the Act of 1862. But the company which was thus to register itself, and thus to send in a list of its shareholders to the registrar under the Act of 1862, might be a company entitled to have and having among its shareholders corporate bodies, whether sole or aggregate, and they would become members of the company registered under that Act of 1862. It would, therefore, be necessary, in reading the Act of 1862, with regard to a company of that kind, to read the word "person" as including bodies politic. So also, on turning to sect. 199, and the following sections, we find provisions for the winding up of joint stock companies formed under 7 & 8 Vict. c. 110, and provisions which, as regards the process of winding up, are identical with provisions applicable to companies formed for the first time under the Act of 1862. There again the whole of those provisions, though apparently pointing to persons and individuals, must of necessity be read as applying to corporate

bodies which should be shareholders under the former Act of Parliament. Now, I think the conclusion irresistible, that if in all these sections to which I have referred, beginning with sect. 180, and ending with sect. 200, the general words used must be read as comprising bodies corporate which are shareholders, there is no reason why, throughout the whole of the Act, from the beginning to the end, the same words should not be read in the same way, and be held to include bodies corporate. It is satisfactory to find that the conclusion at which I have arrived tallies with the conclusion which has been arrived at in several cases, because instances were mentioned, and do not appear to have been disputed, in which limited companies have been registered as shareholders in other companies, and have been fixed as contributories in the course of the winding up of those other companies. It is true the objection does not seem in any of those cases to have been taken, or the point to have been argued, and if the matter rested upon practice alone, probably there would not have been enough in the practice by itself to have led to the conclusion at which I have arrived. But it appears to me, upon the proper construction of the Act, that the practice is entirely warranted by the Act of Parliament. The second argument, therefore, of the official liquidator seems to me to fall to the ground.

The third objection was, that the *Contract Corporation* never accepted a transfer of *Piercy's* shares to themselves, or authorized themselves to be put upon the register. Now, stopping at the facts deposed to by *Piercy*, although it is quite possible that the deed of transfer as a deed at law would have been entirely invalid, and could not have been treated as a deed executed by *Piercy*, yet when the question is not the validity of the instrument as a deed, but whether *Piercy* really offered to transfer, and agreed to transfer, all the shares which he held in the *Contract Corporation*, it is put beyond doubt that *Piercy* tendered to the *Contract Corporation*, so far as he was concerned, all the shares which he held in the banking company, for the purpose of having them transferred and the register changed. After this, the transfer having been filled up by the officer of the *Contract Corporation* (except as to the specific numbers of the shares, and as to the date), and, describing the transferor properly, and the transferee properly, and

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professing to pass the whole number of shares, whatever they might be, which the transferor held in the bank; to the document in this shape the seal of the *Contract Corporation* was affixed, and the transfer was sent in to *Barned's Banking Company* for registration. Now supposing the seal of the *Contract Corporation* was affixed by proper authority, it appears to me to be clear that this would complete the transaction. There would be the full assent of Mr. *Piercy* to give, and the full assent of the *Contract Corporation* to take, and *Barned's Banking Company* would in that state of things be fully justified in registering the transfer. The authority, however, to affix the seal of the *Contract Corporation* is challenged by the official liquidator, and we must see how the case in that respect stands. The onus on this issue is on the official liquidator of the *Contract Corporation*. The seal is affixed, and the document is *ex facie* regular in all respects. The seal is the seal of a trading corporation. Neither in the memorandum of association, nor by the articles, nor by the general law, are any particular formalities prescribed as to the mode in which, or the persons in whose presence, the seal shall be affixed to any document. The case, therefore, differs from the cases cited at the bar, where formalities were prescribed either by Act of Parliament, or by the constitution of the corporate body. Whoever, as a matter of practice, manages the affairs of a trading corporation, must, of necessity, be able to use the seal for those acts which he is authorized to perform. In this case it appears to me, it is quite sufficient to decide the issue as to the authority for using the seal upon the cross-examination of Mr. *Handfield*, a witness evidently desirous, if he can, of supporting the case of the official liquidator of the *Contract Corporation*. Upon that cross-examination, it appears to me that, even without looking further into the practice of the company, or considering whether it was their practice to have, generally speaking, resolutions authorizing the affixing of the seal (though, to judge from extracts from their minute books which have been handed up, that may very well be doubted), but without inquiring into that, ample authority for affixing the seal of the *Contract Corporation* is shewn—authority coming from the very executive who were entitled to carry on all the business of the company. I therefore arrive at the conclusion that as Mr. *Piercy* agreed to transfer, so

the *Contract Corporation* agreed to take, and testified their assent to take, the whole of Mr. *Piercy's* shares. To what I have already said, I may add that it appears a dividend was declared upon the shares in the month of February following. Mr. *Piercy* was not paid this dividend. Mr. *Mozley* states that he received it, and that he carried it to the credit of the *Contract Corporation* in the account current which he had with the *Contract Corporation* of their engagements. To this, also, I may add, that in an affidavit made by Mr. *Handfield*, the secretary, in the month of July, 1866, when the question of the settlement of the list was first agitated, and in the depositions of the directors of the *Contract Corporation* then made, the point of the want of authority to affix this seal never appears to have been raised. It seems to have been entirely an afterthought, raised for the first time by Mr. *Handfield* in his affidavit filed on the present hearing.

The fourth objection of the official liquidator of the *Contract Corporation* was, that Mr. *Mozley*, who was the recipient of this transfer when it was executed, and who handed it in to *Barned's Banking Company* to be registered, ought not to have put the *Contract Corporation* upon the register; that it was contrary to the arrangement between himself and the *Contract Corporation*. In my opinion, it was not in any way contrary to that arrangement. But I should say, in addition, that even if I considered it proved that there was some breach of the engagement between Mr. *Mozley* and the *Contract Corporation* in handing in the transfer of the *Contract Corporation* to be registered, it seems to me that that is a matter with which *Barned's Banking Company* would have nothing whatever to do. It is a matter resting between Mr. *Mozley* and the *Contract Corporation*.

The last objection was, that the entry on the register of *Barned's Banking Company* was not made until after the commencement of the winding up of the *Contract Corporation*. The transfer, however, between *Piercy* and the *Contract Corporation* was complete, and had been sent in to be registered, before the commencement of the winding-up. The *Contract Corporation*, if it had been for their interest to do so, might, notwithstanding the winding-up, have required the registration to be made, and, on the other hand, I apprehend it would have been wholly beyond the power of the

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Contract Corporation at any time to have restrained the executive of *Barned's Banking Company* from performing the ministerial act of entering them as shareholders upon the register. The 153rd section was referred to, which enacts that, "Where any company is being wound up by the Court, or subject to the supervision of the Court, all dispositions of the property, effects, and things in action of the company, and every transfer of shares or alteration in the status of the members of the company made between the commencement of the winding-up and the order for winding up shall, unless the Court otherwise orders, be void." It was said that entering the *Contract Corporation* on the register must lead to some subtraction of their property to satisfy their engagements, and, therefore, was in effect a disposition of their property. I apprehend that is not the meaning of the section. If a bill of exchange upon which a company was liable were dishonoured, the notice of dishonour given to the company, if they were indorsers, after their winding-up, might lead to the subtraction or disposition of part of their property; but it could not, as it seems to me, be contended that the holder of a bill of exchange could not give notice of the dishonour of it to the company after the winding-up had commenced.

I think I have now gone through all the objections taken by the official liquidator of the *Contract Corporation*, and which were pressed in argument with great ability and ingenuity both by Mr. *Baggallay* and by Mr. *Swanston*. In my opinion they all of them fail, and the order of the Master of the Rolls must be affirmed. If any of them had succeeded, of course effect must have been given to them, even although it might have rendered Mr. *Piercy* liable upon shares which really were not his own; but it is satisfactory to find from the conclusion at which I have arrived, and which the Master of the Rolls arrived at, that the legal obligation of the case coincides with the moral obligation, and that those who are the real owners of these shares will be the persons to bear the responsibility upon them. I therefore think this motion must be dismissed with costs.

Solicitors: Messrs. *Linklaters & Co.*; Messrs. *Freshfields*; Mr. *J. J. Ridley.*

In re JOINT STOCK DISCOUNT COMPANY.

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SICHELL'S CASE.

Companies Act, 1862, *ss.* 35, 98—*Rectification of Register on Application of Official Liquidator.*

On an application, under the *Companies Act*, 1862, ss. 35, 98, to rectify the register of shareholders, the Court will have regard to who is the applicant; and where, owing to the default of the company, a transfer has not been registered before the winding-up, the Court will not rectify the register on the application of the official liquidator, whatever may be the right of the transferor to have it rectified, for the official liquidator in such a case represents only the company, to whose default the error is owing, the body of contributories having no interest in the question except through the company, and the creditors having no direct equity against a person whose name has never been held out to them.

THIS was an appeal by Mr. *E. F. Sichell* from an order of the Master of the Rolls, made on the 1st of August, 1867, that the register of the members of the *Joint Stock Discount Company, Limited*, should be rectified by striking out the names of *Walter Ashton* in respect of 200 shares, and the *Imperial Mercantile Credit Association* in respect of 90 shares, as members of the company, and inserting the name of *Sichell* on the register for the 290 shares, and that the name of *Sichell* should be included in the list of contributories in substitution for *Walter Ashton* and the *Imperial Mercantile Credit Association.*

The 8th and 10th clauses in the articles of association of the company were as follows:—

"8. The instrument of transfer of any share in the company shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain a holder of such share until the name of the transferee is entered in the register book in respect thereof."

"10. The company may decline to register any transfer of shares made by any member who is indebted to them for any money then due, or who may be solely or jointly liable to them for any call or interest thereon, or in respect of any bill, note, security, or advance, notwithstanding the same may not then be

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due, or in any case where the directors consider the transferee to be an irresponsible person, or that the transfer is made for purposes not conducive to the interests of the company."

In the beginning of the month of February, 1866, *Ashton* stood on the register for 200 shares, and the *Imperial Mercantile Credit Association* for 90 shares. A few days before the 6th of February, *Ashton* transferred 100 of his 200 shares to *Stafford,* and 100 to *Hogben.* The *Imperial Mercantile Credit Association* transferred their ninety shares to *Hogben,* who, as to both transfers, was a trustee for *Stafford.* These transfers were sent in to the company in the usual way, but the transferees were never registered as shareholders. *Stafford* borrowed money from *Sichell* on the whole 290 shares, and handed to *Sichell* transfers from himself and from *Hogben,* which transfers were never put upon the register. These transfers were lodged by *Sichell* with the company in the usual way, at the office, on the 6th and 7th of February, 1866, and he asked that the shares might be put into his own name.

Sichell was at that time extremely anxious that the shares should be registered in his name, and in his evidence he stated the reason to have been, that a return of £3 15*s.* per share, in respect of a certain call of £5 per share, was then expected, and that he, if the shares were registered in his name, would have the benefit of this return in reduction of his debt. He accordingly, between the 7th and 23rd of February, called frequently at the office of the company, and urged the officers of the company to perfect the transfer in the usual way. He was referred to the chairman of a committee of investigation into the affairs of the company, which at that time was sitting. Nothing was done by the chairman of the committee, and the register of shares was never altered. It was admitted that at this time the shares in the company were disposable, but the company appeared to have been, as regarded its internal condition, in considerable confusion, the committee of investigation above alluded to having been appointed at the end of January to examine into its affairs. It seemed to be admitted, though the evidence was not very precise upon the point, that the transfers to *Stafford* and *Hogben* were approved at the office of the company, and were initialed by the rota director, as he was called, but that the transfers from *Stafford*

and *Hogben* to *Sichell* had never been approved. The reason given for this was, that the approvals by the rota director took place according to the standing in the alphabet of the name of the transferee, and that, as the first letter of *Sichell's* name was low down in the alphabet, the rota director had not reached the transfer to him, and it was not suggested that any judgment was formed under the 10th clause of the articles, or any investigation whatever made, as to the transfer to *Sichell*.

On the 28th of February, 1866, *Stafford* paid off the advance of *Sichell* upon these shares through a broker named *Cohen*, and sold the shares to other parties in the market. The winding up of the company commenced on the 7th of March, 1866.

In the above circumstances the official liquidator applied under the 35th and 98th sections of the *Companies Act*, 1862, and obtained the order under appeal.

Mr. *Southgate*, Q.C., and Mr. *T. A. Roberts*, for the Appellant:—

The case is like that of the equitable assignee of a lease who is not bound to clothe himself with the legal estate on the application of the landlord. Even if the mortgagor could have claimed to have *Sichell* put on the register, which, at all events after repayment of the mortgage debt, we submit he could not, the official liquidator who represents the company cannot. *Ward and Henry's Case* (1) is in our favour.

Mr. *Baggallay*, Q.C., and Mr. *Lindley*, for the *Imperial Mercantile Credit Association*:—

The transfer from us was approved, and there was gross delay in registering it. Therefore, whoever ought to be on the register, we ought not. *Marino's Case* (2) is in our favour.

Mr. *Rodwell*, for *Ashton*.

Mr. *Locock Webb* for the official liquidator, referred to *Price and Brown's Case* (3).

Mr. *Southgate*, in reply.

(1) Law Rep. 2 Ch. 431. (2) Law Rep. 2 Ch. 596.
(3) 3 De G. & Sm. 146.

L. J. C. 1867 — SICHELL'S CASE.

Nov. 25. LORD CAIRNS, L.J., after stating the facts of the case, and reading the 35th section of the *Companies Act*, 1862, and observing that in connection with it the 98th section must also be read, continued :—

In my opinion the reference in the 98th section to a rectification of the register cannot mean that the Court in winding up a company is to rectify the register *ex mero motu suo;* it must mean that the Court may exercise the judicial power conferred by the 35th section, having regard to who is the applicant, and to all the circumstances of the case, otherwise how could the Court, according to the language of the 35th section, be "satisfied of the justice of the case?" In the present case the application was the application of the official liquidator. It is necessary to consider whom the official liquidator represents. Generally speaking, he is said to represent the company, the creditors, and the general body of contributories.

In the present case he has no *locus standi* as representing the creditors. They have no privity with or knowledge of *Sichell;* the name of *Sichell* never has been on the register, or in any way held out to the creditors. It may or may not be for the good of the creditors, it may or may not be their wish, to have the change made, but whether it be or be not to their advantage, or be or be not according to their wish, they, in my opinion, would have no equity whatever to say that the name of the previous holder should be taken off the register, and the name of *Sichell* inserted. As representing the contributories generally, it appears to me the official liquidator would have no right to call for this rectification. The general body of contributories can have no interest in the case, except such interest as they have through the company. Then, as representing the company, the case of the official liquidator amounts to this: "We, the company, have delayed you, *Sichell*, in every way in our power until our failure; we have placed obstacles in the way of the transfer of the shares to you; we have deprived you of any right and of any profit you might have had during the time we were carrying on business; and now, having done this, and after our failure, we come and ask that you may be put upon the list merely for the purpose of incurring a liability." Suppose the company were still solvent and still carry-

ing on business, but that, after conduct such as I have described, they had incurred great loss, seriously depreciating the value of their shares, could they come forward, and, admitting that there had been great and unnecessary delay in transferring, and even a refusal to transfer, the shares to some one standing in the position of *Sichell*, say that notwithstanding the loss he had thereby sustained, and the change in the aspect of the affairs of the company, they still had a right to have the register rectified, which was in a wrong form merely in consequence of their own neglect? It appears to me that they could claim no such right. Then, if the company itself could not make such an application while solvent, so neither, in my opinion, can the official liquidator representing, for this purpose, only the company, make the application after the winding-up

I do not forget that the 35th section provides that an application under it may be made by the company itself. But, as was stated in *Ward's Case*, there are various other purposes for which an application by the company for rectification of the register might be necessary, without assuming that the Legislature intended to allow the company to come to rectify the register where the error arose from its own unnecessary delay.

I may observe, by way of further illustration of the difficulty of making this alteration in the register at the instance of the official liquidator, that if the object is, as the 35th section would seem to imply, to put the register in the form in which it should throughout have been but for the alleged delay of the company, this would be done not by putting on the name of Mr. *Sichell* only, but by removing the *Imperial Mercantile Credit Association* and *Ashton*, and putting on not merely *Sichell*, but also his transferors, *Stafford & Hogben*, with whatever liability may attach to past members. It is sufficient in this case to decide, and I do not do more than decide, that a company after failure cannot come, through its official liquidator, and ask to remove one name which is on its register and substitute another, on the ground that the company ought to have done so before its failure, the person whose name is on the register not himself making any application. It may be said that the *Imperial Mercantile Credit Association* and *Ashton* are before the Court, and that they might apply under sect. 35. My

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answer is, that at present they have not done so. I will not prejudice their right to do so, nor shall I express any opinion as to what circumstances will warrant an alteration in the register after the winding-up, or whether there was or was not such unnecessary delay in this case as would warrant their application. I may, however, say, that as at present advised I cannot see that they can in any case have any right beyond that of asking that the names of *Stafford & Hogben*, their immediate transferees, may be substituted for theirs. Whether *Stafford & Hogben* would have any desire to have their transferee, *Sichell*, put on, I do not know, and as to whether they would have a right to insist upon his being put on I offer no opinion, beyond saying that at all events it is difficult to see how *Stafford*, the mortgagor of *Sichell*, having paid off his mortgage on the 28th of February, and sold the shares to other persons, could insist that the name of Mr. *Sichell*, a mere trustee for him, and entitled to be indemnified by him, should come on the register merely to incur a liability. The order I propose to make is,—to discharge the order of the 1st of August, 1867; to refuse the application of the official liquidator at the Rolls, with costs to be paid to *Sichell*, but with leave to the official liquidator to have those costs and his costs of this appeal out of the estate; to restore the register to the state in which, as to these shares, it stood at the time of the winding-up, with the usual notice to the Registrar of Joint Stock Companies. But this is to be without prejudice to any application that the *Imperial Mercantile Credit Association* and *Ashton, Stafford*, and *Hogben*, or any of them, may make touching the rectification of the register as to these shares.

Mr. *Southgate*, for the Appellant, asked that his costs of the appeal might be paid out of the estate, as the case governed other cases, on which ground he had his costs below out of the estate.

The LORD JUSTICE LORD CAIRNS held that he could not give the Appellant costs of the appeal out of the estate.

Mr. *Lindley*, for the *Imperial Mercantile Credit Association*, asked for costs, on the ground that he had been brought before the Court to settle a point between *Sichell* and the company.

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The LORD JUSTICE LORD CAIRNS:—As you have appeared to support an order which has been reversed, I cannot give you any costs. I cannot give costs of the appeal out of the estate to any one but the official liquidator.

Solicitors for *Sichell:* Messrs. *Lewis & Lewis.*

Solicitors for the *Imperial Mercantile Credit Association:* Messrs. *Ashurst, Morris, & Co.*

Solicitors for *Ashton:* Messrs. *Paine & Layton.*

Solicitors for the Official Liquidator of the *Joint Stock Discount Company*: Messrs. *Lawrance, Plews, & Boyer.*

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In re BANK OF HINDUSTAN, CHINA, AND JAPAN. *Ex parte* JOSEPH MACKRILL SMITH.

Solicitor's Lien—Set-off—Companies Act, 1862, *s.* 163.

The liquidators of a company brought an action against *S.*, in which the Defendant obtained judgment with costs. *S.* was indebted to the company in a larger amount on a bill of exchange. The costs of *S.*'s attorneys in the action being unpaid, they proceeded in his name to levy execution. The execution was stayed under an interim order in the winding-up, a sum being retained by the liquidators sufficient to meet the costs for which the judgment had been signed. *Stuart*, V. C., held that the solicitors' lien could not prevail against the right of set-off and granted an injunction to restrain *S.* from proceeding with the execution, and discharged the liquidators from retaining the sum set apart:—

Held, on appeal, that, apart from the *Companies Act*, 1862, s. 163, there was at common law no right to set off the debt on the bill of exchange against the judgment; that the solicitors had a lien on what could be recovered by the execution, and that they had the same right against the sum set apart which represented the proceeds of the execution:

Held, also, that if the *Companies Act*, 1862, s. 163, applied to such a case and made the execution void (as to which *quære*), this Court would put the Defendant and his solicitors in the same position as if the execution were not so restrained:

Held, therefore, that the solicitors must be paid their costs out of the sum set apart.

THIS was a motion by *Joseph Mackrill Smith*, by way of appeal from an order of Vice-Chancellor *Stuart*, granting an injunction to

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restrain him from proceeding with an execution against the assets of the *Bank of Hindustan, China, and Japan, Limited,* and discharging the liquidators from the obligation imposed upon them by a previous order, to retain £200 to meet *Smith's* claim.

On the 21st of December, 1866, an order was made for continuing, under the supervision of the Court, a voluntary winding up of the company, a resolution for which had been passed on the 19th of November.

On the 5th of February, 1867, the liquidators commenced an action in the name of the company against *J. M. Smith,* to recover £1170 18*s.* 4*d.* on a guarantee, in which he had joined with some other persons. A verdict was found for the Defendant, his costs were taxed at £143 13*s.* 4*d.*, and judgment was signed for that sum on the 23rd of July, 1867.

At this time *J. M. Smith* was indebted to the bank £327 on an overdue bill of exchange. The liquidators claimed to set off this sum against the judgment.

Smith took out a summons for an order on the liquidators to pay the £143 13*s.* 4*d.*, and an order not having been obtained he, on the 3rd of August, 1867, issued execution, under which the sheriff entered into possession of the bank premises.

The liquidators, on the 7th of August, 1867, moved for an injunction before Vice-Chancellor *Malins* (sitting for Vice-Chancellor *Stuart*), who made an order directing the sheriff to withdraw, and the liquidators to set apart £200 to answer any claim which *Smith* might establish, and adjourning the motion to come on in Michaelmas Term, before Vice-Chancellor *Stuart,* to whose Court the winding-up was attached. On the 7th of November Vice-Chancellor *Stuart* made the order under appeal (1). *Smith* was in *China,* and

(2 W.R. 258)

(1) The decision of the Vice-Chancellor was as follows:—The question in this case is, whether the lien of a solicitor in respect of costs is to interfere with a right of set-off which certainly would otherwise exist. I understand it to be perfectly established in this Court that the lien of a solicitor is never to interfere with the rights of the parties. This doctrine is clearly laid down by Lord *Langdale,* in *Cattell* v. *Simons* (6 Beav. 304), and is established by a long list of cases referred to in *Daniell's* Chancery Practice, p. 1694, n. Mr. *Dickinson* has, indeed, shewn that, for some reasons not quite intelligible or satisfactory to my mind, the Courts of law have adopted a different rule, and from some benign consideration of the rights of the officers of their Courts, as they are called, I mean the attorneys, as against their clients, have decided

it was in evidence that he had not paid his solicitors, who had also been his attorneys in the action, their bill of costs. And they avowed that they were resisting the set-off for their own benefit, though in his name, in order that they might not lose their lien.

Mr. *Dickinson*, Q.C., and Mr. *Eddis*, for *Smith*:—

Set-off cannot be allowed to interfere with the lien of the solicitors: *Mitchell* v. *Oldfield* (1); *Randle* v. *Fuller* (2); *Glaister* v. *Hewer* (3); *Middleton* v. *Hill* (4); Gen. Ord. 1853, rule 63; *Cattell* v. *Simons* (5); *Verity* v. *Wylde* (6); *Bawtree* v. *Watson* (7); *Rawson* v. *Samuel* (8); *Pelly* v. *Wathen* (9); *Ex parte Cleland* (10); *Daniell's* Chancery Practice (11).

Mr. *Greene*, Q.C., and Mr. *Lindley*, for the liquidators:—

The result of the cases in equity is, that the solicitor's lien is not to interfere with the rights of the parties. The right of the solicitor is against his client, and the client cannot give him a right better than his own.

[The LORD JUSTICE LORD CAIRNS referred to *Hanson* v. *Reece* (12)].

Ex parte Cleland does not apply, for there the taxation had been completed before the creditors' deed was executed, so the *jus tertii* had completely attached. But, even if the Court be against us

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that, except in the case of interlocutory applications, the lien of an attorney shall be allowed to interfere with the rights of the parties. That is for the consideration of the Courts of common law. Lord *Kenyon* and the other Judges who acted upon that rule say, that it is not the law, but that it is a sort of equity. It may be a common law equity; but it is an equity that has been abjured by this Court. I for one abjure it most distinctly, and say that the lien of no solicitor of this Court can or ought to interfere in ordinary cases with the rights of the parties. In this case, therefore, in my opinion, the solicitors are not entitled to assert their lien to the prejudice of the obligations of this contributory to the company, and therefore the proceedings under the execution must be stayed.

(1) 4 T. R. 123.
(2) 6 Ibid. 456.
(3) 8 Ibid. 69.
(4) 1 M. & S. 240.
(5) 6 Beav. 304.
(6) 4 Drew. 427.
(7) 2 Keen, 713.
(8) Cr. & P. 161.
(9) 1 D. M. & G. 16.
(10) Law Rep. 2 Ch. 808.
(11) 4th Ed. p. 1694.
(12) 3 Jur. (N.S.) 1204; 6 W. R. 46.

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on that point, we contend that the judgment creditor can only come in *pari passu* with other creditors: *Ship's Case* (1); The *Companies Act*, 1862, sects. 133, 163; *Re Exhall Mining Company* (2).

LORD CAIRNS, L.J.:—

In this case, subsequent to the resolution of the company to wind up its affairs without the aid of the Court, and subsequent to the order for carrying on that winding-up under the supervision of the Court, an action was brought by the liquidators against Mr. *Smith*, as one of six persons whom they conceived to be liable to the company on a joint and several guarantee. The action, though brought by the liquidators, was brought, as the Act requires, in the name of the company. The claim, for some reason which need not now be considered, was held to be unfounded, and judgment was obtained by the Defendant, which was signed in the usual way, with an allocatur for his costs. The appeal now before me is in the name of the Defendant, Mr. *Smith*, but the application is really in the interest of his solicitors, who claim to have a lien upon the judgment for the amount of their costs due from him, which are shewn by affidavit to be unpaid.

Two questions of considerable importance have been raised in the case. In the first place, it has been contended that under the 163rd section any execution under this judgment must be void to all intents and purposes, and that, therefore, neither Mr. *Smith* nor his solicitors can claim by virtue of the execution. Then it is contended, further, that even if that were not so, still the amount of interest which the solicitors can claim under the judgment must be measured by the amount of the client's interest in the judgment, and that inasmuch as the client is indebted to the company upon a bill of exchange, the company have a right to set off that sum against the costs due from them upon the judgment.

I will consider the second of those questions first, and put aside for the moment the 163rd section. Putting aside that section, there is a judgment at law against the company, upon which judgment execution could issue against the property and effects of

(1) 13 W. R. 1016. (2) 4 N. R. 127.

the company. It is perfectly clear that at common law a sum of money due from the Defendant to the company, but which had not become the subject of any other action, could not be set off against the judgment, and that the Defendant, notwithstanding such cross demand, could proceed to execute his judgment at law, and recover his costs; and, *à fortiori*, if it were shewn to the Court of common law that the proceedings to recover the costs were really for the benefit of the solicitors, the Court would recognise the lien of the solicitors, and refuse to recognise a right of set-off which would defeat it.

Then, still disregarding for the moment the 163rd section, let us see what has taken place in this Court. The execution at law having issued, the sheriff was in possession. The liquidators were desirous that the sheriff should be withdrawn from possession, and applied to this Court for that purpose, and by an order of the Vice-Chancellor *Malins*, sitting in the Vacation for Vice-Chancellor *Stuart*, an arrangement was made by which the sheriff was to withdraw from possession upon certain terms, the liquidators retaining in hand £200 out of the assets of the bank to answer any claim which *Smith*, or his attorneys, might establish. The sheriff having withdrawn, and the £200 being retained, the only question which would then arise would be, what are the rights which Mr. *Smith*, or his attorneys, may establish upon that sum? Now, assuming the judgment and the execution at law to be valid, and that sum to represent, for convenience, what might, if execution had gone on, have been obtained as the fruit of the judgment, then, in my opinion, the solicitors of Mr. *Smith* would clearly have been entitled to come to this Court, as they might have gone to a Court of common law, and say, "Our client must not receive this £200, which has been levied under the execution; but we have a lien on it, and we are entitled to have our lien satisfied out of that sum."

Thus the matter would have stood if the 163rd section had not been in the way. But it is said that the 163rd section makes the execution altogether void. I should be sorry to have to decide to that effect without very much more consideration, for the result of such a decision would be extremely important as regards the position of companies when they are being wound up. The con-

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sequences of the decision would be, that a liquidator, being armed with powers to bring whatever actions he thinks fit, might bring any number of groundless actions, which would be defeated one after another and judgment would go for the Defendant, and yet the Defendant, when he came to levy for his costs by virtue of his judgment, would be told that his execution was void, and that he must go in and take the chance of obtaining a dividend under the process of winding up. But it seems to me that for the purposes of this case it is immaterial how that section may be construed, and I will assume, although I repeat I do not mean to decide, that the section does apply to an execution on a judgment obtained against a company in a proceeding brought by the liquidators, and in which the company is the aggressor. It seems to me that, even in that view of the case, it would be open for the Defendant at law, who had succeeded in the action, to come to this Court in the winding-up, and say, "Even if I am not to be at liberty to issue my execution at law, I apply to this Court to pay me the amount of the costs which I have incurred." Perhaps he might say "I might have asked beforehand for security at law for the costs of the action, but I did not think it necessary to do that, but there being money belonging to the company in the Court of Chancery, I ask that I may be paid those costs which the liquidator has, without any ground, obliged me to incur." If he might say this, then I apprehend that the solicitor also might come to this Court and say "Granted that execution cannot issue at law, yet this Court, being a Court of equity and justice, ought to put both me and my client as nearly as possible in the position that we should have been in if our execution at law had not been technically restrained by the words of the 163rd section." And, in my opinion, this Court ought, as a matter of justice and equity, to recognise the claim of the solicitor, just as his claim would have been recognised by a Court of law if it had been in his power to issue execution, and to obtain the fruits of the execution at law. If the Defendant could come to the Court and, no set-off being alleged against him, recover the amount of his costs here, so, also, I think this Court would say that the costs really are the property, *pro tanto*, of the solicitor for the purpose of his lien, and ought to give effect to that lien in the same way as effect would have been

given to the lien against the fruits of the judgment, had the judgment not been intercepted by the 163rd section.

In either view, therefore, whether the case is looked at under the 163rd section, or independently of it, I think the costs of these solicitors ought to be paid, and that, this £200 having been set apart for the purpose, they ought to be paid out of that fund. In my opinion, therefore, the order of the Vice-Chancellor is erroneous, and an order ought now to be made directing payment of the taxed costs out of the £200, and the Appellant must have his costs in the Court below out of the same fund. That part of the Vice-Chancellor's order which directs the liquidators to have out of their estate their costs, and the amount they paid to the sheriff, will not be disturbed.

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Solicitors for the Appellant: Messrs. *Flux, Argles, & Rawlins.*
Solicitors for the Liquidators: Messrs. *Ashurst, Morris, & Co.*

In re NEW ZEALAND BANKING CORPORATION.

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L. J. C. 1868 *Jan.* 14, 15, 16.

Winding-up—Contributory—Illegal Issue of Shares—Subsequent Confirmation—Subdivision of Shares.

The directors of a company whose capital was £300,000, divided into 3000 shares of £100 each, made an unauthorized issue of 1000 additional shares beyond their capital. They afterwards called general meetings, at which resolutions were passed to increase the capital to £600,000, to be divided into 60,000 shares of £10 each:—

Held (reversing the decision of the Master of the Rolls) that the issue of the 1000 shares, although originally *ultrà vires*, was confirmed by these resolutions; and that the allottees of them were bound by the resolutions, and were rightly placed on the list of contributories in the winding up of the company:

Held, also, that although the subdivision of the original shares was illegal, yet where the original shares could be traced and identified, the shareholders were properly placed on the list of contributories.

THIS was an appeal from an order of the Master of the Rolls, in the winding up of the *New Zealand Banking Corporation, Limited*, made on the application of the official liquidator, to place Mr. *H.*

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Sewell's name on the list of contributories for 23 shares of £100 each, or their equivalent, 230 shares of £10 each, and for 115 new shares of £10 each.

The company was registered on the 29th of April, 1863. A memorandum of association was registered, but no articles; and consequently the articles of association in Table A. of the *Companies Act*, 1862, became applicable to the company. The memorandum of association stated that the capital of the company was £300,000, divided into 3000 shares of £100 each.

The directors having issued nearly the whole of the 3000 shares, and being apparently under the impression that the capital of the company was double what it really was, on the 13th of February, 1864, passed a resolution to issue an additional 1000 shares to their chairman, Mr. *A. Hankey*, who had undertaken to place that number among his friends. This issue was unauthorized by the shareholders, and was admitted to be illegal.

In March, 1864, *Sewell*, who is a stock and share broker in *London*, and a relative of Mr. *Hankey*, together with several other persons, signed a document, which was called in the argument a "syndicate." It was in the following terms:—

"March 11th, 1864.

"We, the undersigned, hereby undertake to guarantee Mr. *G. Sichel*, of No. 36, *Old Broad Street*, in respect of all risk attaching to a credit which he has obtained for a period of eighteen months, as far as regards the number of shares in the *New Zealand Banking Corporation, Limited*, to which our names are severally hereunder attached; and we authorize Mr. *Sichel* to use this our guarantee to that extent, as security to the parties granting the credit, the shares in question being held by Mr. *A. Hankey* (together with transfer in blank from each of us for our respective quantities) as trustee for Mr. *G. Sichel* and ourselves mutually. Should the quantity of shares obtainable (of first and second issue) be less than the total required by us, we agree to be responsible for such lesser quantity as can be rateably apportioned to us."

Then followed the signatures, with the number of shares for which each subscriber was to be responsible, *Sewell* signing for 100 shares, and the others in amounts varying from 25 to 300

shares. After *Sewell's* name were written the words "for *H.* and *Arthur Sewell*," but they appeared to have been added by Mr. *Hankey*.

Sewell stated in his evidence, that, having perfect confidence in *Hankey* and *Sichel*, whom, having been formerly connected in business with *Hankey*, he considered to be identical with *Hankey* in this transaction, he signed the "syndicate" without any careful consideration of its effect, and that he did not understand the effect of the document to be that he was to become a shareholder in the company.

Under the authority of this document, *Hankey* and *Sichel* procured 23 shares, namely, 8 old shares and 15 of the new issue, to be allotted to *Sewell*, which was done on the 15th of April, and his name was placed on the register of shareholders for that number. No formal notice of this allotment was sent to *Sewell*, nor did he pay any deposit upon them. The directors having discovered their error in making the unauthorized issue of 1000 shares, called general meetings of the shareholders on the 2nd and 23rd of May 1864, at which resolutions were passed and confirmed:—first, that the subscribed capital of the company be increased to £600,000, to be divided into 60,000 shares of £10 each, in lieu of 6000 of £100 each, and that the £10 shares of the new denomination, credited with £1 paid up, be issued in exchange for each one of the old shares, credited with £10 paid up; secondly, that the unissued 2000 shares be offered to the registered owners of the 4000 shares already issued, in the proportion of one new to every two old £100 shares.

It was intended that these resolutions should have the effect of confirming the allotment already made of the unauthorized issue of 1000 shares of £100 each, equivalent to 10,000 of £10 each, before referred to, so that 20,000 new shares of £10 each would alone remain to be disposed of. *Sewell* was not present at either of these meetings, and he stated in his evidence that he did not remember receiving notices or proxy papers for them: but it appeared on the minutes of the meeting of the 23rd of May that his proxy was produced at the meeting, and made use of in support of the resolutions.

A circular, dated the 23rd of May, 1864, was sent to *Sewell*,

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informing him of the resolutions, and also that his proportion of new shares was 115, on which a call of 10s. per share, amounting to £57 10s., would be payable on the 15th June, 1864. A form of application was inclosed, which, however, *Sewell* did not sign until the 15th of June, when *Sichel* sent him a cheque for £57 10s., and *Sewell* accordingly sent in the application, and paid the amount due.

On the 14th of September, 1864, *Sewell* paid a further call of £57 10s., being 10s. on each of the new 115 shares, and on the 14th December he paid a third call of £28 15s., being 5s. on each share, both of which sums were supplied by *Sichel;* and in December, 1864, he received a dividend warrant for £12 19s. 2d., being a dividend on 345 shares, which sum he received and handed over to *Sichel.*

The company was wound up in May, 1866, at which time *Sewell's* name stood on the register of shareholders for 345 shares of £10 each, and the official liquidator sought to place him on the list of contributories for the whole of these shares.

The Master of the Rolls was of opinion that the issue of the 1000 additional shares in February, 1864, being *ultrà vires,* the 15 shares of that issue which were assigned to *Sewell* were never legally allotted to him, and that he was not a shareholder in respect of them: but he directed his name to be settled on the list of contributories in respect of 8 original shares of £100, represented by 80 shares of £10, and 115 new shares of £10. From this decision both the official liquidator and *Sewell* appealed.

In the course of the argument before the Lord Justice, *Sewell* was cross-examined in Court on his affidavit by the counsel for the official liquidator, and re-examined by his own counsel.

Mr. *Baggallay,* Q.C., and Mr. *J. N. Higgins,* for the official liquidator:—

We contend that Mr. *Sewell* was a shareholder in respect of all the shares which appeared on the register in his name. After signing the proxy for the general meeting of the 23rd of May, in which the number of his shares must have appeared, and also the application for new shares, and after paying calls and receiving a dividend on the shares, it is impossible that he can be allowed to

contend that he had no notice of the shares having been originally allotted to him, or of the subsequent subdivision of the shares into £10 shares, or of the additions made to the capital of the company. The only question is, whether the effect of the unauthorized issue of the 1000 shares to the chairman was such that it could not be set right by the subsequent resolutions. Independently of those resolutions, it could hardly be contended that, in such a case, the allottees might go on dealing with the public for any length of time as shareholders, and then be allowed to repudiate their liability. But in this case the directors, as soon as they discovered their mistake, rectified it by obtaining the sanction of the shareholders to an increase of capital, which covered the irregular issue.

With respect to the conversion of the £100 shares into £10 shares, we do not deny that this was illegal, so far as regarded the original shares, but the shareholders cannot, on that account, escape their liability if the shares can be traced and "ear-marked:" *Feiling's and Rimington's Case* (1).

Sir *Roundell Palmer*, Q.C., Mr. *Southgate*, Q.C., and Mr. *Fry*, for Mr. *Sewell*:—

Mr. *Sewell* contends that he never intended by signing the document of the 11th of March, 1864, to authorize Mr. *Sichel* to make him a shareholder of the company; and he denies having notice of the number of shares which were allotted to him. If the document was an authority at all it was an authority to obtain an allotment of shares to the subscribers rateably, according to the number of shares placed against their names. It was not meant that Mr. *Sichel* should appropriate all the shares to some of the subscribers and none to the others. If, therefore, Mr. *Sewell* is liable for any shares under that document, it can only be for a proportional part of those really allotted.

But we also contend that his liability can only extend to the original eight shares, for the twenty-three shares which formed part of the unauthorized issue of 1000 shares never had any legal existence. It is argued that Mr. *Sewell* is estopped from denying his liability, but there can be no estoppel with respect to shares

(1) Law Rep. 2 Ch. 714.

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which do not exist: *Bunn's Case* (1). The resolutions passed at the meetings of the 2nd and 23rd of May, 1864, were not sufficient to legalize the previous unauthorized issue, for the true state of the case was not put before the meeting, and the shareholders could not ratify what they did not understand.

Mr. *Baggallay*, in reply.

Jan. 16. LORD CAIRNS, L.J.:—

In this case, by the order made by the Master of the Rolls, Mr. *Sewell* has been fixed upon the list of contributories in respect of 8 £100 shares, and in respect of 115 £10 shares. Mr. *Sewell*, by his appeal, contends in form that he ought not to be upon the list for any shares. The official liquidator, by his appeal, contends that he should be retained upon the list for the shares in respect of which he is already fixed, and that in addition he should be upon the list in respect of 15 £100 shares.

On these two appeals various questions were argued. It appears to me that they may be divided into three. The first question is this:—Is Mr. *Sewell* liable for any and what number of shares irrespective of any question as to whether the issue of certain of the shares allotted to him was or was not authorized, and irrespective also of any question as to the change in the denomination of £100 into £10 shares. The second question is:—If the issue of some of the shares allotted to him was unauthorized in the first instance, is he upon that ground freed from any part of his liability? And the third question, upon which little argument took place, is this:—Is he relieved from liability in respect of any shares upon the ground of the change in the denomination of those shares?

The case as it is now presented for judgment differs considerably from that which was before the Master of the Rolls. The evidence before his Lordship as to the questions of fact was in many respects meagre, and the parties, I think very properly, agreed before me that Mr. *Sewell* should be cross-examined upon his affidavit. He

(1) 2 D. F. & J. 275; 6 Jur. N.S. 1223.

was cross-examined before the Court and re-examined on his own behalf. In many respects as to the details of the transaction his memory is not good, but his evidence, which I am bound to say was very fairly given, presents in my opinion a tolerable distinct view of the whole transaction. [His Lordship then referred to the facts previously stated, and continued:—]

Now stopping there, and supposing there were nothing else in the case, it appears to me that a more simple case for placing Mr. *Sewell* on the list in respect of all these shares could not exist. He gave a general and somewhat ambiguous authority for the purpose of having his name entered as a shareholder of the company; he knew it was acted upon; he not only knew it was acted upon, but he knew the number of shares for which, in consequence of that authority, he had been placed on the list of the company. He acted by virtue of the title thus acquired in claiming a further part of the capital of the company, and received a dividend upon all these shares. That would be a simple case if there were nothing more in it.

Before, however, passing from that part of the case, I must advert to an argument that was pressed by Sir *R. Palmer* as to the manner in which the authority given by the document of the 11th of March, 1864, was pursued. That document ended with these words: "Should the quantity of shares obtainable (of first and second issue) be less than the whole desired by us, we agree to be responsible for such lesser quantity as can be rateably apportioned to us." Sir *R. Palmer* said that this might be an authority to become answerable each for the whole number of shares affixed to his name; but if the whole number that was desired should not be given to each, then the agreement was merely that each should be responsible for a rateable proportion upon the footing of every person whose name was on the document getting his rateable proportion. And Sir *R. Palmer* observed, which was not disputed, that there were several names affixed to the document to whom no shares at all had been allotted, and that therefore the number of shares that had been obtained was cumulative, if I may use the expression, to a greater extent than was intended upon the other persons to whom they were allotted. Now, I will assume that that is the proper construction of the document, and that Mr. *Sewell* might have

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complained that the authority had not been pursued with regularity. I say I assume that, because I have considerable doubt about it. It is obvious, for example, that this being an operation which must have been conducted by stages, it might not have been possible to obtain from time to time more than, say, fifty or sixty shares, and it would have been utterly out of the question to have allotted different parcels, so obtained from time to time, rateably among these persons. It might well have been that, *ex necessitate*, the authority could not have been pursued in that way. But I will assume the construction to be otherwise. Mr. *Sewell*, according to the conclusion I have drawn from the fact, did know in the month of May, 1864, that regularly or irregularly, rightly or wrongly, under this authority, he had been put upon the list as a shareholder for twenty-three shares. If he had any doubt as to the manner in which the authority had been pursued, it was for him to have inquired whether he could have asserted any right against either Mr. *Sichel*, or Mr. *Hankey*, or the company, arising out of the mode in which the authority had been pursued. Whether he could have disclaimed the ownership of these twenty-three shares may be doubtful, but I assume in his favour that he might have had a case of that kind. It appears to me that not having done so, and being aware that he was held out to the public as the holder of twenty-three shares, it is too late for him months or years afterwards to enter into that question. With regard to the first question, therefore, it is clear that Mr. *Sewell* would have, if there were nothing more in the case, to be on the list for the whole number of shares.

I now come to the question of what is called the unauthorized issue. The facts as to that appear to me to be very clear. The company was established with a capital of £300,000 only, in 3000 £100 shares, so in point of law it stood up to the month of May, 1864, but in February, 1864, the directors seem to have taken upon themselves (whether under mistake as to law, or otherwise, I do not know) to have issued over and above the 3000 £100 shares another 1000 shares of £100 each, attempting thus to add £100,000 to the capital of the company, and to make it a capital of £400,000. In point of law that of course was invalid. I have said that eight and fifteen shares had been allotted on the 15th of April to

Mr. *Sewell.* The eight shares were in respect of the original and proper capital of the company of £300,000; they are quite clearly ear-marked. The fifteen shares were taken out of this additional capital of £100,000. I will assume, therefore, in favour of Mr. *Sewell* that it would have been open to him at this stage to have said that he had been made, in respect of these fifteen shares, a shareholder in a capital which did not exist, or invalidly existed, and that no right could exist to make him a contributory at that point. What took place afterwards was this:—The meetings to which I have referred, on the 2nd and 23rd of May, passed special resolutions extending, as the company had the power in that way to extend, their capital to £600,000, and professing to subdivide the old capital into £10 shares. As to the old capital, according to the previous decisions of the Court, the £100 shares could not be properly so divided. As to the new capital, by the articles of association the company had the power to raise it in shares of any amount they thought fit. The result was, that if the resolutions were properly worded, there was power to increase the capital to £600,000, and as to the new capital, to divide it into £10 shares. Now the resolutions were in these words:—[His Lordship read the resolutions as stated above.] So far as words are concerned, it appears to me there can be no doubt that although the expressions in these resolutions are not, perhaps, the happiest that could be used, yet, in substance, they describe clearly the course that was necessary in order to cure any irregularity which had been committed. The resolutions take notice that 4000 shares of £100 each had already been issued. The resolutions take notice that there would be 2000 more shares of £100 each to make up the capital of £600,000, to which it was intended to raise the capital of the company. The resolutions affirm that the capital is to be raised from whatever was the proper capital at that time up to a capital of £600,000. And the resolutions take further notice that those persons to whom, *de facto*, the 4000 £100 shares already issued had been allotted, should be the persons and the only persons to have the first offer of the 20,000 £10 shares which were then to be issued. The resolutions thus construed, appear to me to put out of the case the argument that was suggested, namely, that the new shares ought to have been offered, and that the reso-

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lutions were wrong in not offering them, to the holders not of the 4000 shares issued, but of the 3000 shares which formed the proper capital.

Then it is said that these resolutions were invalid for the purpose intended, because the company was not sufficiently informed of the irregularity that had been committed. The company was a company consisting of shareholders. It is impossible not to impute to every shareholder of the company the knowledge of what has been called the charter of documents under which the company was trading. The company was trading under the memorandum of association as its principal document. I think every shareholder must be taken to have known the contents of the memorandum of association, and would be thus informed that the original proper capital of the company was £300,000, in 3000 shares. The balance sheet before the shareholders at this meeting shewed that, *de facto*, a capital of £400,000 had been obtained by an attempted issue of 4000 shares. The shareholders, therefore, had exactly before their minds, if they chose to address their minds to it, all the facts that were necessary, and in the face of that, and with that knowledge, they passed the resolutions to which I have referred. So far as the shareholders at large were concerned, there appears to have been no concealment which would deprive the resolutions of any validity which they would otherwise have had. Then it is said that, whatever other shareholders might have known, Mr. *Sewell* knew nothing of all this. Now Mr. *Sewell*, as I have already said, must, so far as regards the confirmation of these resolutions, be taken to be an assenting party, by virtue of the proxy by which he attended at the second meeting. But in addition to that, being clearly a shareholder at this time, to some extent, the letter of the 23rd of May, 1864, had expressly told him that he was taken to be a holder of 23 of those 4000 shares which had been issued—23 or 230, according as you take the unit or the decimal—that he was the holder of 23 or 230 of the 4000 or 40,000 shares which had been already issued. If I am right in my construction of the resolutions, that issue of capital had been confirmed on that very day by the resolutions which had been passed. That appears to me to be quite enough information for Mr. *Sewell*. It was for him, then, if he had any objection to make

in point of irregularity, or otherwise, to have made his complaint, and to have endeavoured to dispute the status and position which was assigned to him by that letter, which he never did. I may add, that upon that same day a new entry on the register was made, entering Mr. *Sewell* as the holder of 230 shares in the capital of £400,000. Therefore, I am not at all prepared to say that even if nothing had taken place before the 23rd of May, if there had been no previous authority or previous negotiation between Mr. *Sewell* and the company, that information, not disputed by him, but acted upon by him in his application for new shares, would not have been enough to fix him as a shareholder in the capital to the extent of the whole of these shares. So much, therefore, for the second point as to the unauthorized issue.

Then as to the reduction of the denomination from £100 to £10 shares. Little or no argument took place upon that, clearly no argument can take place upon it after the previous decisions of this Court, and I do not understand that the Master of the Rolls had any doubt upon that part of the case. As to the original eight £100 shares, they have, no doubt, been attempted to be converted into £10 shares. That was irregular; but there is no difficulty in tracing and ear-marking those shares in their present shape of 80 shares. As to the rest of the shares, they were properly issued as £10 shares. I think, therefore, that Mr. *Sewell* must be fixed on the list for the whole of these shares.

The order will be to confirm the order of the Master of the Rolls, except as regards fifteen £100 shares, and to add to the order that he is to be fixed with 150 £10 shares. It will be proper to treat them as £10 shares, for I think that there was quite jurisdiction in the company in making valid the issue of £100,000 to make it valid in any denomination they thought fit.

Now, as to the costs, the official liquidator succeeding to this extent in his appeal will have his costs out of the estate. With regard to Mr. *Sewell's* appeal, I am unable to accede to it; but, at the same time, I should not in any event have dismissed that appeal with costs, because a great deal of new matter has been introduced here, and the case now is not a re-hearing on the evidence before the Master of the Rolls. But, in addition to that, I observe that the Master of the Rolls was informed by the Chief

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Clerk that this was a representative case governing others of a considerable amount, and he therefore ordered the costs of the proceeding before him to be paid out of the estate. My view, therefore, is, that as the case is one of difficulty, and as the difficulty in some respects was certainly caused by the course which the company took in dealing with the capital, which required investigation and explanation, the costs of both of these appeals, as well as the costs below, ought to come out of the estate.

Solicitors for the Official Liquidator: Messrs. *Lewis, Munns, & Co.*

Solicitors for Mr. *Sewell:* Messrs. *Fox & Robinson.*

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Ex parte ATHERTON. *In re* ATHERTON.

Bankruptcy—Order refusing Discharge—Jurisdiction to review Order—Bankruptcy Act, 1861, *s.* 168.

The Court of Bankruptcy has power to review an order refusing the discharge of a bankrupt, although it has no power to review an order granting or suspending the discharge.

THIS was an appeal from a decision of Mr. Commissioner *Perry*, of the *Liverpool* District Court of Bankruptcy.

The Appellant, *Isaac Atherton*, was adjudicated a bankrupt in August, 1864, and ultimately, on the 20th of June, 1865, the Court made an order refusing his discharge, on the ground that he had contracted debts without having had any reasonable ground of expectation of being able to pay the same.

The bankrupt did not appeal from this order; but, on the 2nd of December, 1867, he applied to the Commissioner to appoint another day for the bankrupt to apply for an order of discharge. The Commissioner, however, refused the application on the ground that the Court had no power to review an order refusing the discharge of the bankrupt.

Mr. *Yate Lee*, for the bankrupt:—

The Court of Bankruptcy has all the powers and authorities of

the superior Courts of law and equity (1), among which is the power of reviewing its own decisions, if any injustice appears to have been done. This power has constantly been exercised by the Court: *Ex parte Roffey* (2); *Ex parte Baker* (3); *Ex parte Bolland* (4); *Hopkins's Case* (5). In the particular case of an order for discharge, the power was taken away by the *Bankrupt Law Consolidation Act*, 1849 (6), which enacted that the allowance of the certificate by the Court, and any order for the refusal or suspension of the allowance thereof, except in case of appeal, should be final and conclusive, and should not be reviewed by the Court, unless there had been false evidence or fraud. But, by the *Bankruptcy Act*, 1861, that section was repealed, and by the 168th section of the last-mentioned Act the power of the Court to review its decisions was only restrained in the case of an order of discharge having been granted or suspended; no mention being made of the case of an order of discharge being refused. The original jurisdiction in that case remains, and has been repeatedly exercised.

Mr. *Bardswell*, for the assignees.

LORD CAIRNS, L.J.:—

I think there cannot be any doubt in this case. There is no question that the reason which influenced the Legislature in providing for the finality of an order of discharge was this—that if an order was made for the discharge of a bankrupt unconditionally, or after an interval, the public would deal with the bankrupt as a free man; and if the order was afterwards reversed, there might be a question whether all dealings which had taken place with him in the meantime would not be invalid. Therefore it was material that the Legislature should provide that, in the absence of fraud, an order of discharge should not be open to revocation, so that innocent persons who had dealt on the faith of it should not be placed in peril. But the Bankruptcy Act of 1849 went beyond the necessity of the case, for it enacted that "the allowance of the certificate, and any order for the refusal or suspension of the

(1) *Bankrupt Law Consolidation Act*, 1849, sect. 1; *Bankruptcy Act*, 1861, sect. 1.
(2) 19 Ves. 468.
(3) Mont. & M'A. 279.
(4) Ibid. 325, n.
(5) 10 Jur. (N.S.) 529.
(6) Sect. 207.

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allowance, except in case of appeal, shall be final and conclusive ;" and thus the Legislature not merely guaranteed the conclusiveness of the order of discharge, but of the order refusing the discharge. If that parliamentary enactment remained still unaltered, I should of course be bound by it; but by the Act of 1861 there was a change made, and it was enacted, by the 168th section, "that the order of discharge, whether suspended or not, shall not be reviewed by the Court." The section clearly contemplated that the order of discharge had been obtained. In the present case there was no order of discharge, and therefore, if the Commissioner thinks that it is a proper case for a reconsideration of the matter, I am of opinion that he has full jurisdiction to rehear it. With that expression of opinion the case must be remitted to the Commissioner.

Solicitors for the Bankrupt: Messrs. *Cooke & Talbot.*

Solicitor for the Assignees: Mr. *J. H. Lydall,* agent for Messrs. *T. & T. Martin, Liverpool.*

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Ex parte JONES. *In re* JONES.

Bankruptcy—Annulling Adjudication with Consent of Creditors—Bankruptcy Act, 1861, *ss.* 110, 185.

The power of the Court of Bankruptcy to annul an adjudication with the consent of all the creditors who have proved may be exercised without resorting to the procedure under the 110th and 185th sections of the *Bankruptcy Act,* 1861; and that power may be exercised in a suitable case after the first meeting of creditors.

Semble, the Court may on sufficient grounds refuse to annul, though all the creditors who have proved assent to the application.

THIS was an appeal from an order of Mr. Commissioner *Perry,* of the *Liverpool* District, dismissing the petition of the bankrupt for annulling the bankruptcy.

The Appellant, *William Henry Jones,* was adjudicated bankrupt on his own petition.

The first meeting of creditors was held on the 24th of December, 1867, when a creditors' assignee was chosen, and one of the

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creditors proved. The bankrupt then presented a petition, with the assent of the creditor who had proved, praying that the adjudication might be annulled on the ground that a deed of arrangement with his creditors had been prepared, and was in course of execution by the creditors. It appeared that the deed had been assented to by twenty-eight out of forty-three, the whole number of his creditors, representing £19,835 out of £21,180, the whole amount of his debts; and the bankrupt was willing to execute it as soon as his bankruptcy had been annulled. The Commissioner considered that the bankrupt ought to have availed himself of the 110th or 185th sections of the *Bankruptcy Act*, 1861, and that the Court had no jurisdiction to entertain the application. From this decision the bankrupt appealed.

Mr. *Little*, Q.C., and Mr. *Yate Lee*, for the Appellant:—

Originally, the Court was in the habit of superseding the bankruptcy upon the consent of all the creditors who had proved, whenever the application was made. But, in accordance with an opinion expressed in the case of *Ex parte Duckworth* (1), that more time ought to be allowed for the creditors to come in to prove their debts, Lord *Eldon* made a general order that in future no commission should be superseded on consent of all the creditors until after the second meeting: *Cooke's* Bankruptcy Law (2). But at that time there were three meetings, at the second of which the assignees were appointed. Under the present practice, which was introduced by the 1 & 2 Will. 4, c. 56, s. 20, the choice of assignees takes place at the first meeting, and the creditors ought to come in at that meeting. There is, therefore, no reason for any delay: *Ex parte Kimbell* (3). The power of the Court to annul the bankruptcy, with the consent of all the creditors who have proved, is not taken away by the 110th or 185th sections of the *Bankruptcy Act*, 1861, which provide for the case of a division of opinion among the creditors, and enable the majority to bind the minority on certain conditions: *Griffith* on Bankruptcy (4). In the present case the great majority of the creditors who have not proved consent to the application, and are anxious to avoid the delay and

(1) 16 Ves. 416.
(2) 8th Ed. vol. ii. p. 278.
(3) 1 M. D. & De G. 138.
(4) Pages 791, 793.

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inconvenience of complying with the formalities prescribed by the sections referred to.

Mr. *Bardswell*, for the creditors' assignee, who was also the trustee of the deed of arrangement.

LORD CAIRNS, L.J.:—

I am not prepared to say that it is so necessarily a matter of course to annul an adjudication with the consent of the creditors who have proved and the assignees, that, if the Court was of opinion that the application was made for the purpose of obtaining an advantage over absent parties, it would be bound to grant the application. I do not, however, understand that in the present case the Commissioner thought there was any sinister object; but he was of opinion that he was bound to refuse the application because it was the duty of the bankrupt to proceed under the sections referred to in the *Bankruptcy Act*, 1861, and in no other way, although he had the consent of all parties. I am not of that opinion. I think that the sections were framed in order to present a safe way in which the consent of a large majority might bind the minority in case of a division of opinion; but they were not intended to limit the power of the Court to annul the adjudication with the consent of all parties. I think the Court still has that power, and that this is a proper case for its exercise. The Commissioner's order will, therefore, be discharged, and the bankruptcy annulled; and the Appellant must execute the deed of arrangement.

Solicitor for the Appellant: Mr. *W. W. Wynne.*

Solicitor for the Assignees: Mr. *J. H. Lydall*, agent for Messrs. *T. & T. Martin, Liverpool.*

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Bankruptcy—Accounts—Adjournment of Last Examination.

Where a bankrupt has filed accounts which are clearly imperfect and capable of amendment, the Commissioner has power to adjourn the last examination of the bankrupt *sine die*, although he swears that he can furnish no better accounts. *Secus*, if the accounts, though suspected of falsehood, are complete.

THE bankrupt in this case was a butcher, who had carried on a large business, and on whose estate there was a great deficiency. The Commissioner had ordered him to file a deficiency account, and a stock and cash account. He filed no deficiency account, and a very imperfect stock and cash account. On coming up for his last examination on the 13th of December, he swore that, from the nature of his business, he had no books or records, and could not furnish better accounts. The Commissioner, Mr. *Perry*, thereupon adjourned the examination *sine die*. The bankrupt appealed against this order.

Mr. *Yate Lee*, for the bankrupt, said that the Commissioner had no right to punish a man in this way because his accounts were not satisfactory: *In re Lewis* (1); sect. 162 of the Bankruptcy

(1) 1866. Nov. 9. L. JJ.
Ex parte LEWIS. *In re* LEWIS.

Bankruptcy—Adjourning last Examination—Insufficient Accounts.

THIS was an application by a bankrupt to reverse an order made by Mr. Commissioner *Goulburn*, adjourning his final examination *sine die*, and refusing him protection.

The Appellant, who was a livery stable keeper, was adjudicated bankrupt in November, 1865. His debts were about £1300, and his assets consisted of little more than his furniture, which was valued at £68, subject to a claim by his landlord for rent.

The final examination had been adjourned from time to time because the Commissioner was not satisfied with the bankrupt's accounts. In particular, it appeared that he had sold certain horses and carriages, part of his stock-in-trade, to his son; but his creditors alleged that this was a collusive sale, and the bankrupt and his son gave different accounts of the transaction, and the last statements made by the bankrupt himself were inconsistent with those made by him previously. Under these circumstances the Commissioner, considering that the bankrupt had not given a full and true account of his estate and effects, adjourned his final examination *sine die*.

Mr. *De Gex*, *Q.C.*, and Mr. *Robertson Griffiths*, for the Appellant, contended

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Act of 1849. *Re Grummitt* (1) and *Ex parte Sellers* (2) were also referred to.

Mr. *Reed*, and Mr. *Foard*, on the other side :—

If accounts like this are sufficient it is a premium on bad accounts. A large property has disappeared, and the creditors wish to know more about it.

Mr. *Yate Lee*, in reply.

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that the bankrupt had made a full disclosure of all his estate. If it was false he was liable to an indictment for perjury, but no further information could be obtained from him by adjourning the examination.

Mr. *Reed*, for the assignees, argued that the Commissioner was right in adjourning the case until he was satisfied that the bankrupt had given a true account of the sale. It was not enough that his accounts should be full; they must also be true.

THE LORD JUSTICE TURNER said, that the case involved a question of importance as to the circumstances under which the last examination of a bankrupt ought to be adjourned. In all cases in which the bankrupt refused to make a full disclosure, an adjournment was proper; and there might be cases in which the bankrupt was giving a false account for the purpose of hiding the true state of his property, in which cases it would be a question for the Court to consider whether he was likely to give a better account if brought up again for examination. Here the bankrupt and his son gave different accounts of the transaction, and it might be that his own statements were inconsistent with each other; but it did not follow that if the examination were again adjourned the bankrupt would give a better account than he gave before. The conclusion to which their Lordships had come was that the examination ought not to have been adjourned *sine die*, and that the proper course now would be that another day should be appointed for him to go before the Commissioner, and that all questions should be reserved till his application for discharge.

THE LORD JUSTICE CAIRNS said that he concurred. No doubt this was a case of grave suspicion; but the question was whether the power of adjourning the examination *sine die* was given for the purpose of punishing the bankrupt for a falsehood, and putting pressure upon him to induce him to correct a false statement which he had made upon oath. He did not think that was the object of the Act. The bankrupt might be wrong in what he had stated, and that might be ground for proceedings against him for perjury; but the Commissioner had got all he could out of him, and he could get no further information by adjourning the examination *sine die*. The order would therefore be discharged, and the bankrupt's protection renewed for a month, in order to enable him to go again before the Commissioner. The bankrupt would be allowed no costs.

Solicitor for the Appellant: Mr. *Earle*.

Solicitor for the Respondent: Mr. *S. Salaman*.

(1) 10 Jur. (N.S.) 738.

(2) 2 De G. & J. 218.

LORD CAIRNS, L.J.:—

I desire to adhere to all that was said in the case of *In re Lewis*, for I think that the power of adjourning the examination *sine die* was never meant to be a power of punishing the bankrupt in order to make him retract what he has stated, and state something which the creditors think more probable; but power was, no doubt, given by the Act of 1849 to adjourn the last examination *sine die*, and the question is, for what purpose that power was given? My opinion is, that the purpose was to obtain a desirable end, which could not be obtained if the last examination was passed, and the question was left to be disposed of upon the application for discharge, because then nothing would be open to the Court to consider, except whether some of the acts mentioned in the statute had been committed which could be punished by suspending his discharge.

But in order to obtain from the bankrupt a full and complete statement of his dealings, which is an important object, the Court has power to define from time to time the form of the accounts required; and in this case the Commissioner made orders for filing a deficiency account and a stock and cash account. No deficiency account has been filed, and the bankrupt swears that he is unable to furnish any; but from other parts of his evidence it is clear that some sort of deficiency account could be filed. He has also sworn that he cannot furnish a better stock and cash account, but the account is upon the face of it imperfect and capable of being improved. It has been argued that the Court is powerless, and must take the bankrupt's oath; but it appears to me that these accounts can certainly be amended, and, when amended, he would be open to examination upon the amended accounts. I therefore think that the learned Commissioner was quite right in the order which he has made, and that it would have been a dereliction of duty if, with accounts in this unsatisfactory state, he had allowed the bankrupt to pass as if the order had been complied with. I think that he can comply much more satisfactorily, and the order of the Commissioner must be affirmed.

Solicitor for the Bankrupt: Mr. *J. H. Lydall.*
Solicitors for the Assignees: Messrs. *Yates & Martin, Liverpool.*

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Ex parte LEE. *In re* LEE.

Bankruptcy—Discovery—Suspending Proceedings during Proceedings in another Court.

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It is not the course of the Court of Bankruptcy to suspend proceedings before itself, because a proceeding which may give information as to the bankrupt's estate is pending in another Court.

A bankrupt applied for an order of discharge; but the Commissioner adjourned the meeting for the bankrupt to put in his answer to a bill in Chancery, on the ground that the answer might shew that he had not made a full disclosure of his property. On appeal this order was reversed, and, there being nothing on the bankruptcy proceedings to raise a suspicion that a full disclosure had not been made, the order of discharge was granted.

THIS was an appeal by the bankrupt from an order of Mr. Commissioner *Goulburn*, adjourning the consideration of his discharge for three months, with liberty to him to apply earlier if he should in the meantime have put in his answer to a bill in Chancery which had been filed against him, the learned Commissioner being of opinion that the answer might shew that the bankrupt had not made a full disclosure of his affairs. The creditors had, before the bankrupt applied for his discharge, passed a resolution under sect. 110 of the *Bankruptcy Act*, 1861, for accepting a composition and suspending the proceedings. It did not appear that there was anything on the proceedings in bankruptcy tending to shew that a full discovery had not been made.

Mr. *De Gex*, Q.C., and Mr. *Robertson Griffiths*, for the Appellant, referred to *Ex parte Tilston* (1).

Mr. *Darby*, for the opposing creditor:—

The bankrupt is bound to make a full discovery: *Ex parte Jones* (2). The statute makes full disclosure a condition precedent to the order of discharge, and the learned Commissioner, if not judicially satisfied that such full disclosure had been made, was justified in suspending the discharge till the close of proceedings tending to throw light on the question.

(1) Law Rep. 2 Ch. 199. (2) 12 W. R. 221.

Lord Cairns, L.J.:—

An account which, *primâ facie*, does not appear to be other than a proper and satisfactory one is on the file; the items in it are not disputed, and there is the oath of the bankrupt that it is a full and true account. I do not collect that the learned Commissioner came to the conclusion that, on the materials before him, there was reason to suspect the bankrupt of not having made a full discovery; His Honour appears only to have proceeded on the ground that the answer might shew such to be the case. But it is the course of the Court of Bankruptcy to form its conclusions from what appears on its own file of proceedings. If the Court thinks that there is a want of information, it has ample means of obtaining it by proceedings before itself; but, especially in a case circumstanced like the present, it is not according to its course of practice to suspend the bankruptcy proceedings for the purpose of obtaining information from the result of proceedings in another Court. The order of the Commissioner, therefore, must be reversed, and an immediate order of discharge granted.

Solicitor for the Appellant: Mr. *H. M. Daniel.*
Solicitor for the Opposing Creditor: Mr. *W. A. Day.*

L. J. R. 1867 Dec. 7.

Ex parte RAYNE. *In re* RAYNE.

Bankruptcy—Last Examination—Pendency of Proceedings in another Court.

The last examination of a bankrupt ought not to be adjourned to await the result of proceedings in another Court; but may properly be adjourned pending any proceedings in bankruptcy which are likely to bring out facts as to which the bankrupt ought to be further examined.

THIS was an appeal by the bankrupt from an order of Mr. Commissioner *Holroyd*, adjourning the bankrupt's last examination *sine die*, with liberty to him to apply.

The bankruptcy took place on the 2nd of May, 1866, and an assignee was chosen on the 30th. The bankrupt filed his statement of accounts on the 30th of June, 1866, from which it appeared that he had no property. It was discovered that in November, 1865, he had sold to his brother, *Middleton Rayne*, for £100, his interest in a family estate. On the 6th of February, 1867, Mr. *Owens*, a creditor, obtained leave from the Court to file a bill in the name of the creditors' assignee for impeaching this sale; but, owing to difficulties as to the indemnity, the filing it was delayed until the 21st of October, 1867.

At an adjourned sitting for passing the bankrupt's examination, on the 7th of November, 1867, *Owens* and another creditor requested a further adjournment till the result of the proceedings in Chancery was known. The learned Commissioner considered that there ought to be such an adjournment, and accordingly adjourned the sitting *sine die*, with liberty to the bankrupt to apply at any time (1).

(1) The following is an extract from a short-hand note of the learned Commissioner's judgment:—

"The difficulty in this case arises from the bankrupt, who having an interest in an estate of considerable value, disposed of that interest for a mere nominal sum upon the eve of his bankruptcy. Then he puts in his account that he has got no property. Then a question has been raised by certain creditors which involves this: that he has ample to pay, and which will have the effect of making a very large estate upon these accounts, instead of the accounts being, as they now are, *nil*. It appears to me, that if a man before his bankruptcy enters into negotiations

After this, the opposing creditors obtained a meeting for the examination of *Middleton Rayne* and his solicitor as to the purchase in question. This meeting was adjourned from the 3rd of December, 1867, to the 8th of January, 1868, the bankrupt's brother having refused to produce certain documents relating to the purchase.

Mr. *Druce*, Q.C., and Mr. *Robertson Griffiths*, for the bankrupt, in support of the appeal, referred to *Ex parte Lee* (1).

Mr. *De Gex*, Q.C., and Mr. *Reed*, for the opposing creditors.

Mr. *Bagley*, for the assignees.

SIR JOHN ROLT, L.J.:—

The learned Commissioner's order adjourning *sine die* the bankrupt's last examination, and leaving it to him to apply to get his order of discharge, appears to be grounded on the pendency of the proceedings in Chancery. It was scarcely contended before me, and hardly can be contended, that the Court of Bankruptcy ought to suspend its proceedings till a suit pending before another tribunal has been disposed of, and I think that the learned Commissioner's order, therefore, cannot be sustained. It was, however, urged, with good reason, that if there be ground to suppose that any proceedings which are pending in bankruptcy may bring out facts as to which the bankrupt ought to be further examined, that is a good ground for postponing the final examination. I am of opinion, therefore, that though the final examination ought not to be adjourned on account of the Chancery proceedings, it ought to be adjourned till the examination of the bankrupt's brother and his solicitor has been had. The order of the Commissioner will therefore be varied by adjourning the last examination till the

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which there is ground for suspecting, it is not unreasonable that he should be called upon by the Court to wait under his bankruptcy until that matter has been determined, or until, at all events, a fair and reasonable time has been given to enable the parties to get the determination of the Court in which the matter is pending.

(1) *Ante*, p. 150.

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9th of January, being the day following that to which the examination of the bankrupt's brother and his solicitor stands adjourned.

Solicitors for the Bankrupt: Messrs. *G. & W. Webb.*
Solicitors for the Opposing Creditors: Messrs. *Morten & Meadows.*
Solicitors for the Assignee: Messrs. *Rooks, Kenrick, & Crook.*

L. J. R. 1867 — *Nov.* 7; *Dec.* 6.

In re BLAKELY ORDNANCE COMPANY.
Ex parte NEW ZEALAND BANKING CORPORATION.

Company—Debentures payable to Bearer—Assignment of Chose in Action—Whether subject to Equities.

B. and *D.* agreed in writing with the promoter of a company to sell their business to the company when formed, part of the purchase-money to be paid in debentures of the company payable to bearer. The articles of association adopted this agreement, and directed it to be carried into effect. The directors accordingly gave to *B.* and *D.* debentures under the seal of the company, by each of which the company covenanted to pay the sum therein mentioned to "*B.* and *D.*, their executors, administrators, and assigns, or to the bearer hereof." Some of these debentures were passed by delivery to *Z.*, who was a *bonâ fide* holder for value:—

Semble, that the debentures could not at law be sued upon by the bearer in his own name, and *quære*, whether they were good at law as bonds or not; but *held*, that as they were conformable to the agreement between *B.* and *D.* and the promoter, which had been made binding on the company, effect must be given to them in equity according to their tenor:

Held, accordingly (affirming the decision of the Master of the Rolls) that in the winding up of the company, *Z.* could prove on these debentures in his own name, without being subject to any equities existing between the company and *B.* and *D.*

THIS was an appeal by the official liquidator of the *Blakely Ordnance Company, Limited*, from an order of the Master of the Rolls, allowing the *New Zealand Banking Corporation, Limited*, to prove in their own name upon certain debentures.

On the 9th of June, 1865, an agreement, in writing was entered into between *Blakely & Dent*, then carrying on business under the firm of "*The Blakely Ordnance Company*," and *B. Hardwick*, reciting the intention of forming a limited company for the purpose of carrying on the business. *Blakely & Dent* thereby agreed to

sell to the company (when established under a memorandum and articles approved by them) the goodwill and effects of the business for £375,000, to be paid as therein mentioned, namely, "the sum of £150,000, by the issue and delivery to the said *A. T. Blakely* and *John Dent*, immediately on the establishment of the company, of debentures to that amount, *payable to bearer*, the capital of which shall be repayable at the end of three years from the end of the date of these presents, and bearing interest at that date, payable half-yearly at the rate of £6 per cent. per annum in the meantime." The rest of the agreement is not material for the purposes of the present report.

The company was registered under a memorandum and articles, dated the 10th of June, 1865. The articles briefly recited the agreement, and by their first clause declared the agreement to be binding on the company as to all acts and things which were by or under such agreement to be done and performed or observed by the company; and it was declared that the said agreement should be carried into effect.

Debentures were issued to *Blakely & Dent* according to the terms of the above agreement. Seventeen of them, for £1000 each, came to the hands of the *New Zealand Banking Corporation*, as holders for value. No transfers of any kind had been executed, the debentures being treated as payable to bearer. These debentures were instruments under the seal of the company, signed by two directors and countersigned by the secretary, and in the following form:—

"The *Blakely Ordnance Company, Limited*, in consideration of the sum of £1000 paid to them by *A. T. Blakely* and *J. Dent*, hereby covenant with the said *A. T. Blakely* and *J. Dent*, their executors and administrators, to pay to the said *A. T. Blakely* and *J. Dent*, their executors, administrators, or assigns, *or to the bearer hereof*, on the 30th of June, 1868, at the *Agra & Masterman's Bank, Limited, London*, the sum of £1000; and also to pay to the bearer of every coupon hereto annexed, at the time and place in such coupon mentioned, such sum of money as in such coupon is mentioned: Provided always, that the bearer of these presents, and every bearer of any of the coupons hereto annexed, shall have power to give receipts for the money which is intended to

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be secured by the instrument of which he shall so be the bearer, although he may not be the owner, or the sole or absolute owner thereof, in precisely the same manner as he could have done if he were the sole and absolute owner thereof, and that the company or persons paying the same shall not be bound to inquire into the title of the bearer, or be bound to take any notice of any trust affecting such money, or be affected by express notice of any equity which may then be subsisting in relation to the title of the bearer, or to such instrument as aforesaid, or to the money intended to be thereby secured. Given under the common seal of the said company the 8th day of August, 1865."

Annexed were six coupons for half-yearly payments of interest at £6 per cent. per annum.

These instruments were stamped as bonds. The stamp was affixed after the day on which they bore date, but there was evidence to shew that it was affixed before they were actually executed.

Both companies being now in course of winding up, the *New Zealand Corporation*, by their official liquidator, claimed to prove in their own name upon these debentures. The liquidator resisted this, contending that they could only prove in the names of *Blakely & Dent*, so as to be subject to all equities subsisting between *Blakely & Dent* and the company. The Master of the Rolls decided that the corporation were entitled to prove in their own name.

Mr. *Baggallay*, Q.C., and Mr. *J. N. Higgins*, for the official liquidator of the *Blakely Company*:—

The question is, whether a debenture can, by any words contained in it, be made payable to bearer, so as to entitle the bearer to sue in his own name, without regard to the equities affecting the debenture. If the words making the instrument payable to bearer were omitted, it is clear that the transferee could only sue in the names of *Blakely & Dent*, and subject to all claims against them: *Athenæum Life Assurance Society* v. *Pooley* (1). The assignee of a *chose in action* takes it subject to all equities: *Mangles* v. *Dixon* (2). These instruments cannot take effect as promissory

(1) 3 De G. & J. 294. (2) 3 H. L. C. 702.

notes, not having been stamped before they were issued: 31 Geo. 3, c. 25, s. 19; 37 Geo. 3, c. 136, s. 5; and the policy of the law is opposed to any extension of the power to issue negotiable instruments: *Miller* v. *Race* (1).

Mr. *Jessel*, Q.C., and Mr. *Wickens*, for the official liquidator of the *New Zealand Corporation*:—

Under 8 & 9 Vict. c. 106, there is no distinction between a deed-poll and an indenture. A covenant may now by either be entered into with a person not a party to it. Suppose a deed-poll by which the person executing it covenants to pay the bearer, where is the legal objection to it? and under the statute the case of an indenture is the same. It is every day's practice for an equitable owner to prove in his own name; and as to the right to set up equities, an obligor may contract himself out of it. The case of *In re Agra & Masterman's Bank, Ex parte Asiatic Banking Corporation* (2) governs the present. The instruments are good as promissory notes, if it be requisite to resort to that, for any stamp, if of sufficient amount, will do: 55 Geo. 3, c. 184, s. 10.

Mr. *Higgins*, in reply:—

The object of making the documents payable to bearer was to save stamp duty on assignments, not to prevent the obligors from setting up equities, and that cannot be the effect.

Dec. 6. SIR JOHN ROLT, L.J.:—

In this case the Master of the Rolls, by the order appealed from, directed that the *New Zealand Banking Corporation, Limited*, should be at liberty to prove, in their own name, against the *Blakely Ordnance Company, Limited*, in respect of their claim upon certain debentures under the seal of the *Blakely Ordnance Company*. From this order the present appeal has been brought by the official liquidator of the *Blakely Company*, and it was contended on his behalf, that the proof should be made in the names of *Alexander Theophilus Blakely* and *John Dent* named in the deben-

(1) 1 Sm. L. C. 389, 4th Ed. (2) Law Rep. 2 Ch. 391.

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tures, so as to give to the *Blakely Company* the right of setting up against the party tendering the proof all the equities which the company might have against Messrs. *Blakely & Dent*, and that the *New Zealand Banking Corporation*, as the assignees or bearers of the debenture, ought not to have liberty to prove in their own names. It was not contended for the Appellant that no debt existed. The only question raised was, in whose name it should be proved.

The argument mainly proceeded upon general grounds, and not upon any special circumstances applicable only to this particular company. It was contended for the Respondents, the *New Zealand Banking Corporation*:—first (somewhat to my surprise), that a deed or bond might covenant for payment to bearer, and that the bearer might sue upon it at law in his own name; and, secondly, if this could not be sustained, that the debtors in the obligation, the *Blakely Company*, had, by the form of the instrument, contracted themselves in equity out of the right of appealing to any equities they might have against the obligees, Messrs. *Blakely & Dent*, in settling with the bearer of these debentures.

I cannot accede to the first of these propositions, and, as to the second, though I do not doubt that the debtor in an obligation may, for the reasons to be presently assigned, if his powers of contracting are unlimited, contract himself out of the right of resorting, as against the assignee of the creditor, to his equities against the creditor himself, yet I am not satisfied that the mere power of issuing debentures would authorize the directors of a company to bind the company at large by any such contract. But it is unnecessary for me to pursue these inquiries further, for the case, in my opinion, wholly turns upon the special powers and duties given to or imposed upon the directors by the articles of association of the company.

[His Lordship then stated the substance of the agreement of the 9th of June, 1865, and the first clause of the articles of association, and continued:—]

Now it is admitted by the official liquidator, or, rather, his own affidavit proves, that the debentures now sought to be put in proof are part of the debentures issued and delivered by the *Blakely Company* to *Blakely & Dent* in performance of the agreement; and

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as the articles of association declare that the agreement is binding on the company, and that it shall be carried into effect, and as the debentures are in the very terms prescribed by the agreement, it is impossible, I think, for the company to say that a contract by the directors in the terms of the debentures was *ultrà vires*. It is further proved that the *New Zealand Corporation* in February, 1866, gave value for the delivery of the debentures to them, and advanced their money on the faith, *inter alia*, of the provisions thereof, and notice of such delivery was immediately given by the *New Zealand Banking Corporation* to the *Blakely Company*. There can be no doubt, I apprehend, as to the construction of the debentures. They are payable to bearer, and the object and intention of the parties in making them so payable was, no doubt, to give to any person taking them the right of resorting for payment directly to the obligors without regard to any equities that might exist between them and the original obligees. The parties to the agreement of June, 1865, intended, and have sufficiently, in my opinion, expressed their intention, that this should be so. The company, and every shareholder in it, have, by the articles of association, said they would carry into effect this intention, and the directors by the debentures themselves have, in the name of the company, bound the company to the obligation.

Is there any reason why, if these are all the facts, the obligation should not be literally performed? I think not. It may be doubted whether at law a valid legal obligation was created between the *Blakely Company* and the bearer, whether there was any legal privity of contract except between the *Blakely Company* and Messrs. *Blakely & Dent*, or, indeed, whether, *quâ* bond or debenture, the instrument was not wholly void at law. But I think it unnecessary to determine these questions. Assume the debenture to have been of no avail, *quâ* debenture, at law at all, or of no avail except as between the *Blakely Company* and Messrs. *Blakely & Dent*, still it is evidence in equity of the terms on which the money became due from the *Blakely Company* to *Blakely & Dent*. The right to this money was assignable in equity, and though, in the absence of anything more than a mere assignment, the assignee would take subject to the equities existing between the original parties to the contract, I am of opinion that there is nothing

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inequitable in allowing the debtor in an obligation to contract with his creditor, that he will not avail himself of any such equities, that he will pay the amount due on the obligation to the assignee of the creditor (whether he be such assignee by instrument in writing, or by mere delivery of the obligation) without regard to any such equities, and I have already said that, in my opinion, in this case the *Blakely Company* have so contracted. The debt to be proved is the money due on this contract, and not the amount due on an instrument purporting to be a promissory note. The laws which regulate the stamps to be affixed to promissory notes are not, in my opinion, applicable to the case, and it would, I think, be inequitable to deny the assignee of the creditor the full benefit of the contract entered into between the original contracting parties.

8 Eq 41
11 Eq 493.

In *In re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation* (1), it was held that the rule which makes assignments of *choses in action* subject to the equities existing between the original parties to the contract, must yield when a contrary intention appears from the nature or terms of the contract. I adopt that decision. I think it applicable, as above explained, to the facts of this case.

It only remains for me to observe that some of the Appellant's evidence appears, so far as I can understand it, to have been adduced for the purpose of impeaching the *bona fides* of the original transaction between *Blakely* and *Dent*, and the *Blakely Company*. Even if such a case were proved, it would be of no avail as against the *New Zealand Company* (having regard to what I have already decided), unless the *New Zealand Company* were implicated in the want of good faith suggested. But the whole of this part of the evidence is of the most vague description, and affords no ground for interfering in the present proceeding with the right of the *New Zealand Company* to prove their debt.

On the whole, I am satisfied that the decision of the Master of the Rolls is right, and the appeal must be dismissed with costs.

Solicitors: Messrs. *Lewis, Munns & Co.*; Messrs. *Mackenzie, Treherne, & Trinder.*

(1) Law Rep. 2 Ch. 391.

In re BARNED'S BANKING COMPANY.

ANDREW'S CASE.

L. J. R.
1867
Nov. 14, 21.

Contributories—Past Members—Companies Act, 1862, *s.* 38.

Where it appeared that the persons who were members of a limited company at the time when the order was made for winding it up would not be able to pay enough to satisfy the debts of the company if the whole amount of the shares were called up:—

Held, that past members of the company, who had not ceased to be members for one year prior to the winding-up, must be placed on the list of contributories.

Relative liabilities of past and present members considered.

Order of the Master of the Rolls affirmed.

THE object of this appeal was to determine the principle on which the list of contributories to *Barned's Banking Company, Limited*, was to be settled. The company was registered in June, 1865, and on the 18th of July twenty shares in it were allotted to the Appellant, Mr. *Andrew*. On the 1st of September he transferred the twenty shares to one *John Taylor;* the transfer was registered on the 4th of September, and in May, 1866, an order was made for winding up the company.

The capital of the company was £2,000,000, in 40,000 shares of £50 each, on which £10 was paid, and evidence was given that if the whole of the remaining £40 on each share was called up, the amount produced would not exceed £500,000, which would be much less than would be required to discharge the liabilities of the bank.

Two lists of contributories had been made out: Class A. of present members; Class B. of past members none of whom had transferred their shares more than a year before the winding-up.

Mr. *Andrew's* case was chosen to try the question whether the members of Class B. ought to be settled on the list of contributories. The Master of the Rolls, before whom the case came, made an order that the official liquidator should proceed in Chambers with the settlement of the list of past members of the company (1).

Mr. *Andrew* appealed.

(1) Law Rep. 4 Eq. 458.

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Mr. *Jessel*, Q.C., and Mr. *North*, for the Appellant:—

We admit that there will not be enough when all the capital has been called up to pay the creditors, but still this list cannot be settled at present. If *A.* transfers to *B.*, how can *A.* be put upon the list until you have ascertained that *B.* cannot pay. You cannot have both on the list at the same time in respect of the same shares. Moreover, their liabilities are not the same, for each former shareholder's liability will be different, and it is absurd to place them on one list. It has only been proved that there are present debts, and we deny that any debts exist for which we are liable. This list cannot be settled until all these matters have been inquired into and ascertained.

Mr. *Locock Webb*, for other shareholders in the same interest.

Mr. *Kekewich* (with him the *Solicitor-General*, Sir *C. J. Selwyn*), for the official liquidator:—

We want on the list all who may be liable to contribute. The questions may be difficult, but must be argued by each contributory when a call is made. There is nothing said in the Act of 1862 about separate lists. Sect. 74 defines a contributory, and it does not follow that a contributory will have to contribute anything.

Mr. *Little*, Q.C., and Mr. *Bardswell*, for the creditors' representative:—

If Mr. *Andrew* could prove that he was not an allottee, or that there were no debts, or that all the amount of the shares had been paid by the transferee, then he would be struck off, and that is the object of having the lists of contributories settled. We want him on the list, in order to be prepared to prove in the event of his bankruptcy. He has no right to appear here at all in this manner. The Judge and the official liquidator will settle the list, and then he may apply.

Mr. *Jessel*, in reply:—

The Act makes no provision for these two lists, though the form may be convenient, and everybody at all liable to contribute

ought to be on one list, which, by sect. 98, is to be prepared as soon as possible.

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ANDREW'S CASE.

Nov. 21. SIR JOHN ROLT, L.J. :—

This is an appeal by Mr. *Andrew,* a past member of the company, from an order of the Master of the Rolls made upon the application of the official liquidators, to settle so much of the list of contributories of the former members of the company as includes the past members of the company, and His Lordship ordered that the official liquidators should forthwith proceed in Chambers with the settlement of the list of former members of the company, and that the costs of the applicants, and of *Nicholas Andrew* and others, be taxed and paid and retained out of the assets of the company. The facts are not in dispute. The company was incorporated in June, 1865. Mr. *Andrew* became a shareholder in July. He duly transferred his shares in September, and the winding-up order was made in May, 1866.

The argument on behalf of Mr. *Andrew* was not limited to the special circumstances of his own case, but it was insisted that no list of contributories which should include past members ought at present to be settled. It was admitted that the calls which could be enforced and realized against the present members would not satisfy all the debts of the concern. If the order thus appealed from conclusively determines that those who should be placed on the list directed to be settled will ultimately, on some principle or other, have something to contribute, the several principles which may by possibility affect the call to be ultimately made on them ought to be now also settled, or the settlement of the list ought to be postponed, and all parties interested, or persons representing all such parties, ought to be before the Court in the discussion. But I am of opinion that this will not be the effect of the order, and I doubt whether the Master of the Rolls intended that the order should have any such effect. It is true that he appears in the judgment pronounced when he made the order to have intimated an opinion that, assuming half the debts were contracted after the time the past members ceased to be such members, and the other

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half were contracted during the time they were members, the payment in respect of their shares would be applied to the debts that were incurred during their time, and the other moneys applied in payment of subsequent debts, and if I thought the order involved any such principle I should have asked for further argument thereon, and have given it further consideration. At present I desire to express no opinion upon it, believing, as I do, that the appeal may be disposed of without expressing any such opinion.

The order, coupled with the recital which introduces it (though somewhat inaccurately expressed), may, I think, be read as directing a settlement of so much of the list of contributories as includes the past members of the company. It was said in argument, that describing past members as contributories of itself involves a decision that all in the list must necessarily have, in the end, something to contribute. But I am of opinion that this is not so. The 74th section of the Act of 1862 enacts, that the term "contributory" shall mean every person liable to contribute to the assets of the company under that Act, in the event of the same being wound up, and the 38th section describes the persons who are liable to contribute under the Act. That section provides that every past and present member shall be so liable. True, the 38th section goes on to point out that this liability shall exist with certain qualifications there specified; but persons placed on the list of contributories as past members will not, in my opinion, be necessarily deprived of the benefit of those qualifications if, when a call comes to be made, they can shew they are entitled to the benefit of them. Those qualifications may, no doubt, be in general conveniently considered when the list is settled; but it is not, I apprehend, absolutely necessary then to dispose of questions arising upon them: In the case of *In re Anglesea Colliery Company* (1), it was held by the Lords Justices, confirming a decision of Vice-Chancellor *Wood*, that the holder of fully paid-up shares in a limited liability company is a contributory within the meaning of the language of the two sections of the Act to which I have referred; and this decision, I think, strongly confirms the construction which I have applied to those sections in the present case.

It was said for the Appellant, that this would reduce the

(1) Law Rep. 1 Ch. 555.

list to a mere list of past members, or to a mere transcript of the shareholders' register, and would be useless, and that settling the list thus would only create unnecessary expense. But this argument, I think, is equally without foundation. I apprehend it would be open to any person who was about to be placed on the list, or whom the official liquidator proposed to place on the list of contributories as a past member, to shew, amongst other things, that he never was a member at all, or that his shares were fully paid up, or that no debt then existed which had been contracted while he was a member, and that consequently if he claimed nothing against the company, or the other members, in respect of his past membership, he ought not to be put on the list, and the decision of any such points would usefully clear the way for the decision of any such ulterior questions as may possibly arise in individual cases when a call comes to be made. The way in which the assets of the company existing at the time of the winding-up, and the sums afterwards paid by present members in respect of calls, are to be applied in payment of the debts of the concern, may affect the question of the amount that past members may have ultimately to pay; or, indeed, the application of those assets and calls may be so arranged or marshalled, if that expression is preferred, that past members will have to contribute nothing. But the settlement of the list of past members liable as contributories under the Act is not to be postponed till those questions are settled, and I think this is not a convenient time for settling them. Such a postponement would be very inconvenient, and the Act requires that the list should be settled forthwith; and I think that all persons who, independently of such considerations, are by the Act liable as past members ought to be placed upon it. It was, however, said that past members do not constitute a class, that each case depends on its special circumstances, and that no list of them as a class can, consistently with the language of the Act, properly be made out. But this argument also fails, for placing members on the same list does not necessarily determine that each case on the list is identical in every particular, or that the amount to be called up on the shares held by each will necessarily be the same. The power to make calls given by the 102nd section, is a power to make calls on all or any of the con-

L. J. R. 1867 ANDREW'S CASE.

tributories for the time being settled on the list. Some broad distinctions may usefully be made in settling the list, for instance, it may conveniently be divided into parts distinguishing past from present members; but it will not necessarily follow that all who are placed in the same list, or the same part of a list, will be on an equal footing of liability in proportion to their shares. It probably will be so in most cases, but I think not necessarily so in all.

Without pursuing the argument of the Appellant further, I am satisfied that the Act requires, and for good reason requires, past as well as present members to be placed upon the list as soon as may be after the winding-up order is made, and that the ultimate liability of past members is not to be enforced by rectifying the list from time to time under the General Orders, or by resorting, as was contended for by the Appellant, to the 103rd section of the Act. I think the settlement of such a list will leave open and undecided every right and liability that may depend upon the mode and order in which the existing assets, and the amount realized by calls on present members, are to be applied, and that there is no injustice in subjecting past members to the consequences which the Act imposes on those who are placed on the list.

The appeal will therefore be dismissed, and with costs. I think, as a general rule, that costs in these cases ought to follow the result.

Solicitor for the Appellant: Mr. *W. W. Wynne.*

Solicitors for other Transferors: Messrs. *Tilleard & Co.*

Solicitors for the Official Liquidator: Messrs. *Freshfields.*

Solicitors for the Creditors' Representative: Messrs. *Cunliffe & Beaumont.*

In re PROFESSIONAL LIFE ASSURANCE COMPANY.

L. J. R.
1867
Nov. 7, 8.

Winding-up—Rights of Shareholder-Creditors of Company formed under 7 & 8 Vict. c. 110—Insurance Company—Costs of realizing Assets.

The deed of settlement of a company formed under 7 & 8 Vict. c. 110, contained a provision that each shareholder, as between him and the other shareholders, should be liable to the debts of the company in proportion to his interest in the property of the company, but not further or otherwise, and a covenant that if any shareholder should pay a debt due from the company, the debt should be divided into as many parts as there were shares, and each shareholder should pay one or more such parts in proportion to his interest in the capital of the company, such interest to be determined by the number of his shares. It was also provided that if the company was indebted to a shareholder, the directors should pay him as if he was not a shareholder :—

Held (affirming the decision of the Master of the Rolls), that on the winding up of the company, the shareholders, who were creditors of the company, were entitled to be paid in full like other creditors, by means of a call on the shareholders, they being debited with the call in respect of their own shares, and that if any of the shareholders could not pay the call, the deficiency must be made up by the others.

The company granted policies of assurance, by the terms of which the assured had no claim against the shareholders beyond the amount unpaid on their shares. Under the winding-up, the assets of the company, including the full amount payable on the shares, were applied in paying the policy-holders and the general creditors *pro râta*. It was decided by the Master of the Rolls that the balance remaining due to the general creditors, and the costs of the winding-up, must be raised by a call on the shareholders. On appeal motion to vary this decision by making the costs of realizing the assets a deduction from the assets, so as to throw a share of such costs on the policy-holders :—

Held, that the costs of realizing the assets, in the course of a winding up by the Court, ought to be treated as part of the costs of the winding-up, and to be borne wholly by the shareholders.

THIS was a motion, by way of appeal, on behalf of contributories in the *Professional Life Assurance Company*, seeking to vary a decision of the Master of the Rolls, so as to make it less favourable to persons who united the characters of contributories and creditors of the company.

The company was not a limited company, but one registered under 7 & 8 Vict. c. 110. The policies exempted shareholders from all personal liability to policy-holders beyond the amount of the unpaid parts of their shares. Under the winding-up, calls to

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the full amount of the unpaid capital were made, and the assets, including these calls, were applied in paying the policy-holders and the general creditors *pro ratâ*, and in payment of the costs of winding-up.

The Master of the Rolls then decided:—1. That there was no marshalling, and that the policy-holders could not have a further call made on the shareholders to the amount of what had been paid out of the assets to general creditors; 2. That the costs of the winding-up must be borne by the shareholders, and that a call must be made sufficient to recoup to the assets what had been applied in payment of costs, and also to pay the balance of the general debts; 3. That creditors who were also shareholders were to be paid in full like other creditors, bearing the call as if they had not been creditors; and, 4. That if any of the shareholders were unable to pay the call the deficiency must be made up by the others (1).

The Appellants, who were shareholders and not creditors, contended that shareholders who were also creditors had no further claim against shareholders who were not creditors, and who had paid up their shares, and that, at all events, the creditor-shareholders could not subject any simple shareholders to further liability on account of the inability of other shareholders to pay the call. They further contended that the costs of realizing the assets ought to be borne by the assets, which would, in effect, throw a proportion of them on the policy-holders in exoneration of the shareholders (2).

(1) Law Rep. 3 Eq. 668.

(2) The following were the material clauses of the deed of settlement as regards the present questions:—

"256. That every proprietor of the company, his or her executors, administrators, or assigns, as between him, her, and them, and all or any of the other proprietors of the company, and their respective heirs, executors, administrators, and assigns, shall be answerable and liable for or in respect of the calls, debts, and losses, and demands of or upon the company, in proportion to his or her share and interest for the time being in the funds or property of the company, but not further or otherwise."

"260. That if the company, or any person acting for or on behalf of the company, shall be indebted to any proprietor of the company, or his or her executors or administrators, for any matter or thing relating to the company, the board of directors shall, upon application to them, pay the debt due or owing to such proprietor, or his or her executors or administrators, without

Mr. *Baggallay*, Q.C., Mr. *W. W. Mackeson*, and Mr. *Collins*, for the Appellants, referred to *Re Athenæum Life Assurance Society* (1); *Re State Fire Insurance Company* (2); *Re English and Irish*

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reference to the general accounts of the company, and without requiring any other accounts to be taken than that under which the debt applied for shall have arisen, and so and in such manner as if such proprietor were an ordinary creditor of the company without being interested as a partner therein.

"261. That in any action or suit at law or in equity, in which any proprietor shall be the Plaintiff, and the company, or any person or persons for or on behalf of the company, shall be the Defendant or Defendants, it shall not be lawful for the Defendant or Defendants in such action or suit to plead or set up the partnership created by this deed, or any deed referring hereto, in bar or in preclusion of such action or suit, or to state or set forth in the pleadings thereof as an answer, by way of set-off or otherwise, to the whole or part of the debt sought to be recovered at such action or suit any claim or demand which the company may have against the Plaintiff in such action or suit as a partner therein as aforesaid, and the Defendant or Defendants in such action or suit shall not at any time take any objection in or to any such action or suit on the ground that all or any of the proprietors of the company are not made parties thereto.

"262. That nothing in these presents contained shall extend, or be construed to extend, to prevent any proprietor of the company, or his or her executors or administrators, who shall be sued either at law or in equity for a debt alleged to be due to the company, or against whom any claim or demand shall be sought to be enforced by the company either at law or in equity, or to prevent the company, or any person or persons acting for or on behalf of the company, who shall be sued either at law or in equity for a debt alleged to be due to any proprietor, or his or her executors or administrators, or against whom any claim or demand shall be sought to be enforced by any proprietor, from disputing the validity of any such debt, claim, or demand, on the merits, or his or their liability to the payment or performance thereof, nor to dispense with the usual or necessary proofs, except as hereinbefore and hereinafter mentioned, for substantiating such debt or making good such claim or demand for the Plaintiff or Plaintiffs in such action or suit, nor to prejudice any claim which such proprietor may have against the company, or the funds and property thereof, as a partner therein, or, as the case may be, which the company have against such proprietor, or his or her executors or administrators, to be recovered in such manner, and by such separate and distinct proceeding or proceedings, as such proprietor, or his or her executors or administrators, or, as the case may be, the company, may be entitled to at law or in equity, or by virtue of these presents, or may think proper or be advised to adopt."

"272. That for the purpose of still further facilitating the remedy of the said several proprietors against each other in the event of any claim or demand being made upon any one or more of them for any debt due or owing by the company, or by the whole

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(1) 3 De G. & J. 660. (2) 34 L. J. (Ch.) 436.

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Church and University Assurance Society (1); *Williams* v. *Harding* (2); *Re Norwich Yarn Company* (3); *Stanhope's Case* (4); *Robinson's Executors' Case* (5); *Greenwood's Case* (6).

of the proprietors of the said company collectively, or for any loss, damage, or injury caused or occasioned by the company, and of more effectually indemnifying the person or persons upon whom any such claim or demand may be made against all such losses, costs, charges, damages, or expenses, as they, he, or she, may sustain in consequence thereof, each and every of the said several persons, parties hereto of the first and second parts respectively, so far as relates to the acts and deeds of himself and herself, and of his and her heirs, executors, and administrators, doth hereby for himself and herself, and his and her heirs, executors, and administrators, severally and individually, and in proportion to the extent of his or her interest in the capital of the said company for the time being, which interest shall be ascertained and determined by the number of shares which he or she may hold therein, as shewn by the books of the company, but not further or otherwise, covenant with the others of them, the said parties hereto, and with two, three, or more of them, and with each and every of them severally, and respectively, and individually, and with their and each and every of their respective heirs, executors, and administrators, in manner following, that is to say, that in case any action, suit, or other proceeding, either at law or in equity, shall be brought or instituted by any creditor, or other person or persons having, or supposing himself, herself, or themselves to have, any claim or demand upon the said company, or upon the proprietors thereof, for or in respect of any moneys or debt due and owing by the said company, or of any judgment or decree which shall be had or recovered in any action or suit, or other proceeding at law or in equity, against the said company, or for work or labour done to or for the said company, or for any loss, damage, or injury sustained, or for any other matter, cause, or thing relating thereto, against any other or others of the said parties hereto, his, her, or their executors or administrators, or against any other proprietor for the time being of the said company, and the person or persons against whom any such action or suit, or other proceeding, shall or may be brought or instituted shall be compelled, or adjudged, or decreed to pay the debt or sum so claimed or demanded, or any part or proportion thereof, or any sum or sums of money in consequence thereof, or shall sustain or incur any loss, costs, charges, damages, or expenses, in defraying or resisting any such debt, claim, or demand, or any such action, suit, or proceeding, then and in every such case, and so often as the same shall happen, he or she, the party hereby covenanting, shall and will when and so soon as the person or persons so decreed or adjudged to pay such debt, claim, or demand, or any part thereof, as aforesaid, and who shall

(1) 1 H. & M. 79.
(2) Law Rep. 1 H. L. 9, 24.
(3) 22 Beav. 143.
(4) Law Rep. 1 Ch. 161, 169.
(5) 6 D. M. & G. 572.
(6) 3 Ibid. 459.

The *Solicitor-General* (Sir *C. J. Selwyn*), and Mr. *Roxburgh*, Q.C., for the official manager.

Sir *Roundell Palmer*, Q.C., and Mr. *Fry*, for the shareholder-creditors, were not called upon.

Mr. *Southgate*, Q.C. (Mr. *Pember* with him), for the policy-holders:—

The costs of realizing the assets, if there had been no winding-up, would probably be treated as a deduction from the assets, and not be payable by the shareholders; but the costs of realizing the assets under a winding-up are of quite a different nature.

Mr. *Baggallay*, in reply on the question as to the costs of realizing the assets.

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have sustained or incurred any such costs as aforesaid, shall have caused such costs to be taxed in the manner hereinbefore directed, and have divided such debt and costs, when so taxed, into 20,000 equal parts or shares, or into so many equal parts or shares as the capital of the company shall then be considered as divided into, well and truly pay, or cause to be paid, upon demand, one or more of such parts or proportion and according to the extent of his or her interest in the capital of the company, which interest shall be determined by the number of shares he or she shall hold therein, as shewn by the books of the company, unto the person or persons who shall have paid, or shall be liable to pay, such debt and costs without any deduction or abatement whatsoever, and according to the true intent and meaning of these presents, and moreover that he or she, the party so covenanting, shall and will, in proportion to the amount of his or her interest in the capital of the company, to be ascertained and determined as aforesaid, from time to time, and at all times hereafter, well and sufficiently save, defend, keep harmless and indemnified his or her co-proprietors, and each and every of them, and each and every of their respective heirs, executors, and administrators, goods, chattels, and effects, from and against all costs and charges, damages, losses, and expenses which they or any or either of them, or their or any or either of their heirs, executors, or administrators, shall or may pay, incur, or sustain by reason or in consequence of any claim or demand being made upon them, or any or either of them, for any debt due or owing by the said company, or by the whole of the proprietors collectively, or for any loss, damage, or injury caused or occasioned by the company to any person or persons whomsoever, and which shall or may not be prosecuted or brought to trial, or upon which no decree or judgment shall or may be made or given."

L. J. . 1867 *In re* PROFESSIONAL LIFE ASSURANCE COMPANY.

SIR JOHN ROLT, L.J.:—

The Master of the Rolls in this case has declared or certified his opinion that the whole of the depositors and simple contract creditors of the company, whether proprietors or contributories, or not, are entitled to be paid in full, less the amount required from certain depositors in respect of any call made or to be made upon them in the case of any such depositor being also a contributory of the company, and has ordered that a sufficient call be made to pay the general debts of the company and the costs of the winding-up, and that such call shall be enforced from such of the contributories of the company as remain solvent, and that such contributories shall make up any deficiency occasioned by any other contributories becoming insolvent. It has been admitted in argument before me, by all parties, that this order is right as to creditors who are not shareholders. But it has been contended on behalf of the shareholders who are not creditors, that the order is too favourable to the creditors who are also shareholders, and that they are bound by certain limits imposed by the deed of settlement upon their rights as between themselves and their co-contributories. It has been contended that no shareholder can, for any cause whatever, as between himself and any other shareholders, be liable beyond the unpaid amount of his share in the subscribed capital, or that if this limit of liability cannot be sustained, then the amount of each shareholder's contribution towards the debts of shareholder-creditors must be ascertained by reference to the proportion of his shares to the whole number of shares subscribed for, and not to the number of shares held by solvent persons only, and that no call can be made upon the solvent shareholders in order to pay shareholder-creditors any deficiency produced by the insolvency of their co-shareholders.

I do not think that either of these views is well founded. The questions turn wholly on the construction of the deed of settlement, and the first of the above views is mainly based on the 256th clause of the deed. It is contended that by this clause the liability of every proprietor, as between himself and other proprietors, is clearly limited to the unpaid amount of his calls. This is by no means a literal construction of the clause. By the very words of the clause the liability of each shareholder, as

between himself and his co-proprietors, is to be in proportion to his interest in the property of the company, which may be, and probably would always be, something very different from the amount of his unpaid calls. In fact, the clause is obscure, and requires the assistance of other clauses in the deed to make it intelligible. Again, it may be observed on this clause that its object seems to be to deal with the shareholders or proprietors in that character only, and not to affect their rights, if they have any, in the additional character of creditors.

The second of the above views is mainly based on the 272nd clause, which appears in substance to be a mutual covenant between the proprietors, that in case any proprietor shall be compelled to pay any debt due from the company, the debt shall be divided into 20,000 equal parts or shares (the original number of shares having been 20,000), or into so many equal parts or shares as the capital of the company shall then be divided into, and that each of the parties covenanting shall pay one or more such parts in proportion and according to the extent of his interest in the capital of the company to the person who shall have paid such debt. Now it is admitted, or, at all events, it cannot be, I think, successfully disputed, that the restriction upon liability, if it is to be so called, to be found in the 256th clause must be the same in extent and character as that to be found in the 272nd clause; and this creates an almost insuperable difficulty in adopting either of the constructions which have been contended for, and makes it necessary to refer to other parts of the deed to get at a reasonable construction which shall, if possible, govern and reconcile the whole. There were other clauses of a similar character on which the Appellants relied, to which I do not think it necessary to refer, as they do not carry the case further than the two clauses to which I have referred.

But there are other clauses which appear to me to have been framed for the very purpose of putting the shareholder-creditors on the same footing as outside creditors. The 260th section provides that the company shall pay debts due to a proprietor without reference to the general accounts of the company, "and so and in such manner as if such proprietor were an ordinary creditor of the company without being interested as a partner therein."

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Those latter words are the very words of the deed itself. And this, I apprehend, would have been the right of creditor-shareholders if there had been no provision in the deed on the subject. The Appellants' case requires some clause which would negative this right, but nothing clearly to that effect can be found in the deed, and, on the contrary, we have the 260th section affirming the right, whilst the 261st and the 262nd sections point in the same direction. It was contended that these several clauses merely referred to modes of pleading and other details for carrying into execution the provisions of the 256th and 272nd, and other like clauses; but this cannot be said of the 260th clause, and upon the whole deed I am clearly of opinion that provision was intended to be made, and has with reasonable clearness been made, for payment to the creditor-shareholders of any debts due to them from the company, in the same manner that other creditors are paid, subject to any call made, or to be made, on such creditor-shareholders for the debts and other liabilities of the company, including the debts due to the creditor-shareholders themselves; and that the provisions relied on by the Appellants are introduced to regulate the rights of shareholders as between themselves in the character of shareholders only, and to guard against the possibility of any shareholder being ultimately left to pay more than his proportionate share of such debts and liabilities. This may have been done somewhat clumsily, but I think the effect of the whole deed reasonably clear.

No direct authority in favour of the Appellants' contention was cited, and the *dicta* relied on, when read in connection with the facts to which they were applied, do not at all govern his case.

I do not think it necessary to follow in detail the minor arguments by which the Appellants enforced their views. They are, in my judgment, covered by what I have already said.

Another point was raised as to a question which does not appear to have been argued in the Court below. It was said that the call, though right in including the costs of the winding-up, ought to have excepted the costs of realizing the assets. Such a modification of the order would probably slightly vary the relative rights of the policy-holders and the shareholders, and, as an abstract question, I apprehend that if there were no winding-up order the

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policy-holders' rights against the assets must be subject to the expense of realizing them, which, in that case, however, would probably be very small. But when, as here, a winding-up has been ordered, it must be extremely difficult justly to distinguish the costs of the mere realization of the assets from the general costs of the winding-up; and as the whole character of the costs of realization has been altered by the winding-up order, I think, on the whole, and especially as the question was not argued below, notwithstanding it is said a precedent to the contrary may be found before the Vice-Chancellor *Wood*, I ought not to vary the order in that respect.

The appeal will, therefore, be dismissed with costs.

Solicitors: Messrs. *Travers, Smith, & De Gex;* Mr. *Tayloe*; Messrs. *Vizard, Crowder, Anstie, & Young.*

L. J. R. 1867 *Dec.* 20.

In re FERRIOR (A LUNATIC).
CARROW *v.* FERRIOR.
DUNN *v.* FERRIOR.

Deceased Lunatic—Jurisdiction—Possession of Real Estate—Committee—Receiver—Title Deeds.

After the death of a lunatic there is no jurisdiction in Lunacy to interfere between adverse claimants to the real estate of the late lunatic, although there is jurisdiction to restrain the committee of the estate from taking advantage of his position to assert his own claims as heir-at-law, or to prejudice the rights of adverse claimants.

Therefore, where two rival claimants had filed bills praying for a receiver of the real estates pending the decision of their rights, and then presented Petitions in Lunacy for the appointment of a receiver, the Court refused the application in Lunacy, and also declined to exercise its original jurisdiction in Chancery for that purpose, upon an interlocutory application in the suits.

But the Court made an order in Lunacy for the deeds to be retained in the Master's office for inspection by the claimants.

THIS case came before the Court on a Petition in Lunacy, and also on motions in Chancery in the above-mentioned causes, under the following circumstances:—

On the 9th of September, 1836, *Mary Ferrior* was found a

SC on 6th Jan 1721

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lunatic by inquisition. She died on the 7th of April, 1867, intestate and unmarried, being still a lunatic. At the time of her death *S. W. Saunders* was the committee of her person and estate.

Shortly after the date of the inquisition *Robert Ferrior* was found by the Master in Lunacy to be the heir-at-law of the lunatic. He died in 1849. In June, 1866, advertisements were issued, and claims were subsequently sent in by several persons claiming to be heirs-at-law of the lunatic, among whom were the Plaintiffs *Henry Carrow* and *N. J. Dunn*, and the Defendant *John Best Ferrior*, but no report had been made on their claims when the lunatic died.

The Plaintiff, *H. Carrow*, subsequently filed his bill praying for a receiver of the real estate of the lunatic until the legal title should be determined.

On the 21st of November, 1867, *Carrow* moved for a receiver before Vice-Chancellor *Malins*.

The committee filed an affidavit, in which he said that he had not communicated with the tenants of the estate with respect to the claims of the Defendant, nor of any other person claiming to be heir-at-law of the lunatic. But it appeared that Mr. *Mathias*, who had been many years acting as the solicitor of the committee, introduced the Defendant to some of the tenants as their future landlord, and informed them that he was the heir-at-law of the lunatic; but the Defendant had received none of the rents, in consequence of the disputed claim.

When the motion was made before the Vice-Chancellor His Honour directed it to stand over in order that the Plaintiff might make an application upon the subject to the Lords Justices in the matter of the Lunacy. The Plaintiff *Carrow* accordingly presented a Petition in the Lunacy, praying that the committee might be restrained from giving up the possession of the estate until the rights of the claimants should be determined, that he might continue to receive the rents in the meantime, and that he might retain the title deeds, or else deposit them in the office of the Master in Lunacy.

Subsequently to the hearing of the Petition before the Vice-Chancellor, the Plaintiff *Dunn* also filed his bill for similar relief.

and also moved for a receiver, and the two motions, and also the Petition in Lunacy, were brought on together before the Lords Justices.

Mr. *Glasse*, Q.C., and Mr. *W. W. Mackeson*, for the Plaintiff *Carrow*:—

In cases where the heir-at-law has been found by the Master, or where there is no dispute about the heirship, the Lord Chancellor will at once give possession to the heir; but if there is any dispute, either party is at liberty to present a Petition in the Lunacy. The committee may not take advantage of his office to put himself or any one else in possession as heir, and if he interferes the Lord Chancellor will restrain him: *In re Fitzgerald* (1); *Ex parte Clarke* (2); *In re Butler* (3).

In the present case, the committee may not be technically in possession of the real estate, but he has attempted, through his solicitor, to put the Defendant in possession, and thereby to prejudice the rights of the other claimants. It will not be denied that the Court has jurisdiction in Lunacy to make an order respecting the deeds; and as the question of the receiver is intimately connected with the same matter, the Court will exercise, if necessary, its original jurisdiction in Chancery, and entertain the application made in the suit, in the same way as the Court often exercises its original jurisdiction in Chancery, as well as in Lunacy, when making an order on a Petition under the *Trustee Act*.

Mr. *Schomberg*, Q.C., and Mr. *Everitt*, for the Plaintiff *Dunn*, argued on the same side. They also referred to *Talbot* v. *Hope Scott* (4); *Ex parte Armstrong* (5); *In re Pearson* (6).

Mr. *Jessel*, Q.C., and Mr. *Fry*, for the committee.

Mr. *Osborne*, Q.C., and Mr. *Bevir*, for the Defendant, admitted the jurisdiction of the Court with respect to the deeds. They were then stopped by the Court.

(1) 2 Sch. & Lef. 432.
(2) Jac. 589, 592.
(3) Law Rep. 1 Ch. 607.
(4) 4 K. & J. 96; 4 Jur. N.S. 1172.
(5) 3 Bro. C. C. 238.
(6) C. P. Coop. C. C. 314.

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In re Ferrior (a Lunatic).

Carrow *v.* Ferrior.

Dunn *v.* Ferrior.

Sir John Rolt, L.J. :—

I think I need not trouble you any further, Mr. *Osborne*. The question before me is this, ought I, exercising jurisdiction in Lunacy, or exercising original jurisdiction in Chancery, to entertain the question of appointing a receiver of the deceased lunatic's estate? The question that I propose to deal with is, not whether this is a fit case for the appointment of a receiver, but whether I ought to entertain the application at all, either in one jurisdiction or the other.

If there is any jurisdiction in Lunacy in the matter of the receivership, or in any matter so closely connected with the receivership that it would be convenient that the actual appointment of a receiver should be disposed of at the same time with the matters in Lunacy connected with it, undoubtedly, with the consent of the Vice-Chancellor, which I have in the present case, I should be quite willing to exercise the original jurisdiction, and it would be convenient and right to do so.

As has been said by learned counsel in the course of the argument, where applications are made under the *Trustee Act* which are closely connected with applications in Lunacy, and the Petitions are intituled in both jurisdictions, the Court sitting in Lunacy will at the same time exercise its original jurisdiction in matters which are not strictly within its jurisdiction in Lunacy.

That being so, is there so close a connection between the appointment of a receiver and anything which I have to do legitimately in Lunacy, that I ought to exercise the two jurisdictions together? I think not.

Let us first consider what is the jurisdiction which I have in the matter in Lunacy. The appointment of a committee in Lunacy gives to the committee no estate at all, and no custody of the estate —no duty of any kind connected with the estate—except during the continuance of the lunacy. The custody of the estate, given to the committee under the great seal, is "to hold the premises to the committee from the date of these presents, so long as it shall please us, during the continuance of the lunacy." The duty there ends. No doubt the powers of the great seal, or the jurisdiction in Lunacy, over the committee does not then necessarily end. If, by virtue of the power which he had during the life of the lunatic, he

is in possession of property, or retains any power or authority by virtue of that possession, which he obtained as committee of the lunatic, he must be responsible to the jurisdiction in Lunacy for the due exercise of it. If, for instance, he has any personal estate in his possession, the jurisdiction as to that personal estate will remain. If he has possession of the deeds of the real estate, in that case, in like manner, the jurisdiction over him as to those deeds will remain. If he continues to occupy a portion of the land, possession of which was obtained by him by virtue of his committeeship, then as to that possession the jurisdiction of the Court will remain. If, having been in receipt of the rents during the legitimate period, he still insists upon his right to receive them after his duties have ceased, and obstructs other persons by virtue of his title as committee, I apprehend this Court would say: "You will not be allowed to do so; the Court, in its jurisdiction in Lunacy, will interpose to prevent you from exercising that title or right which you have obtained as committee, to the injury of others asserting beneficial rights." So again, if a person who has been committee claims a beneficial interest upon the death of the lunatic, and asserts any right which he has acquired as committee in a way which will prejudice others who have adverse claims, I apprehend that in that case also the jurisdiction in Lunacy may be exercised in the same manner against the committee.

Now, I think that will be found to be the explanation of the two cases of *Ex parte Fitzgerald* (1) and *In re Butler* (2). In the case of *Ex parte Fitzgerald* the committee of the estate was a claimant asserting a title to the estate, and was insisting upon the powers, benefits, and rights, which he had obtained as committee to the prejudice of others who had set up adverse claims upon the death of the lunatic. It is clear that it was this which induced Lord *Redesdale* to interfere in that case. His words are as follows (3):—"As Mr. *Fitzgerald*, therefore, has thought fit to put himself into the situation of committee, and as such is under the control of this Court (which control, I think, does not determine by the death of the lunatic), he continues liable to account, and liable to all the consequences of any misconduct on his part, and bound to act in delivering

(1) 2 Sch. & Lef. 432. (2) Law Rep. 1 Ch. 607.
(3) 2 Sch. & Lef. 441.

L. J. R. 1867 ~~ *In re* FERRIOR (A LUNATIC). — CARROW *v.* FERRIOR. — DUNN *v.* FERRIOR.

possession as the Court shall direct. I think I ought to make an order to restrain him from receiving rents, or interfering with the estate, by virtue of his possession as committee, without prejudice to any proceedings which he may think fit to take by ejectment or otherwise to recover possession, as heir, as he may be advised. If it is thought fit by Sir *Jerome Fitzpatrick* to institute any suit for the purpose of preserving the estate in the meantime, he may do so. I will not order the possession to either party. It is to be considered as retained in the hands of the committee, just as it would be if a Master had been the committee."

The case of *In re Butler* (1) is an analogous one. In that case the committee of the person, but not the committee of the estate, had obtained possession of the estate. He was directed by the Court to retain possession of nine acres for the convenience and comfort of the lunatic. He, being in possession, set up a claim after the death of the lunatic to the property of which he was in possession, and it was with reference to those circumstances that the Lord Justice *Turner* made the observations which have been referred to in the argument. He says (2):—"If any party thinks right to come to the Court and ask for delivery of the possession, which is the ordinary course taken, then the Court entertains the application; but I never heard that it was the duty of the committee to come to the Court in the first instance. On the contrary, in all the cases which come before us, where a lunatic dies seised of real estate, and the administrator comes for payment of the funds out of Court, we leave the question as to the real estate untouched, in order that any person may assert any title he may think himself to have in respect of the estates." I understand his Lordship there to mean, that where a person in possession as committee insists upon continuing that possession, and asserts his right, claiming a beneficial interest in the estate, the Court has jurisdiction to say, "You, as well as others, are making a claim to the property. You shall not prejudice those whose claims are adverse to yours by virtue of any right which you have acquired as committee."

In a case where there is an heir, found so by inquisition, surviving the lunatic, and asserting his title upon the death of the lunatic, ordinarily there is no application to this Court with

(1) Law Rep. 1 Ch. 607. (2) Law Rep. 1 Ch. 611.

reference to possession. It is the duty of the committee not to interfere with the heir found so by inquisition, or to prevent him from taking possession. I have no doubt that if the committee chooses to obstruct the heir so found by inquisition, and to interfere to prevent his obtaining possession, this Court would make an order that the heir found so by inquisition should be let into possession. This I think will explain the case of *Ex parte Clarke* (1). There it was held that there was "no jurisdiction in lunacy after the death of the lunatic to try the question of heirship, but in a case of disputed heirship the possession was, under the circumstances, given to the parties reported by the Master to be the heirs-at-law. Party claiming to be heir to the lunatic permitted, after the possession of the estates had been given up to the parties reported to be the heirs, to inspect deeds and documents remaining in the Master's office, which it seems may be retained till a proper investigation has taken place." But in a case like the present, where the office and title of committee are entirely at an end, where there is no duty to receive rents, and where he says, "I have discharged all my duties, I have accounted for the rents, I have put nobody into possession, I have not interfered at all," it becomes simply a case of adverse claimants to the real estate of a deceased owner. The right to be decided is in no way connected with the fact that the deceased intestate was a lunatic, or with anything that has been done in lunacy, or with the possession or interference of any person authorized at the time by any authority in lunacy. Why is the jurisdiction in lunacy to be invoked in such a case?

But it was argued that although the committee did not interfere, his solicitor did. Now, upon the evidence, there is no connection between the commitee and the proceedings taken by the adverse claimant or his solicitor. I apprehend that it is impossible for this or any other jurisdiction to say: "Since you have been solicitor for the committee of the estate, you shall not act as solicitor for the adverse claimant."

There is, however, a further argument to this effect. The applicants say: "We had a right to come here as to the deeds." I confess it appears to me impossible to tie the two questions

(1) Jac. 589, 592.

L. J. R. 1867 *In re* Ferrior (a Lunatic). Carrow *v.* Ferrior. Dunn *v.* Ferrior.

together by saying, that as the jurisdiction in Lunacy must deal with the deeds, the Court is enabled to deal with the other matters also. The case is clear with respect to the deeds. The committee of the estate has deeds which he wishes to give to the rightful owner; there is a dispute about the ownership; let the deeds, therefore, be deposited in the Master's office, and let every claimant have access to them, and that matter will be entirely disposed of. The right to the deeds depends upon the right to the estate. That will be tried by the proper tribunal; and when that is determined the right to the deeds will follow.

With respect to the appointment of a receiver, I think the right course for me to take will be to decline to exercise the original jurisdiction. No doubt, it is a very difficult and a very important question—a question which will really require, before it comes to the Court of Appeal, the assistance of the Court below. I think it should be disposed of just as if there had been no lunacy at all. Therefore I shall not refuse the applications, but I shall decline to deal with them; then the matter will go before the Vice-Chancellor in due course.

With respect to the costs, the costs of the applications in the suits will be dealt with by the Vice-Chancellor in the same way as he dealt with the costs before him. The costs of the Petitions in the Lunacy will be reserved; and if the matter does not come back to the Court, each party will bear their own costs.

The order will direct the deeds to be deposited in the Master's office, and they are not to be delivered out until the costs of the committee are paid. All the parties now before the Court are to have access to the deeds at all reasonable times, with liberty to apply in case any party desires to make copies of them.

Solicitors for the Plaintiff *Carrow*: Messrs. *Jones & Blaxland.*
Solicitors for the Plaintiff *Dunn*: Messrs. *Miller & Miller.*
Solicitors for the Defendant: Messrs. *G. L. P. Eyre & Co.*

BRYAN *v.* TWIGG.

L. J. R.
1867
Dec. 6, 7.

Will—Annuity—Survivorship—Gift to Class for Lives or Life of Survivor.

Bequest of an annuity of £100 to the child or children of *J. B.* equally, share and share alike, for and during the term of their joint natural lives, or the life of the survivor of them, or longer liver of them:—

Held (affirming the decision of *Malins*, V.C.), that the children took as tenants in common, without benefit of survivorship, an annuity to last till the death of the survivor, and that the shares of those dying within that period went to their personal representatives.

THE testator, *Jonathan Burnham*, gave to *Susannah* the wife of *J. B. Bryan*, an annuity of £100 for her life, "and from and after the decease of the said *Susannah Bryan*, then I give and bequeath all such annuity of £100 to be laid out and expended by my executors, their executors and administrators, in the maintenance, education, and bringing up the child or children of the said *J. B. Bryan*, on the body of his said wife lawfully begotten, or to be begotten, until they shall arrive at their respective age or ages of twenty-one years, as they my said executors and administrators respectively shall from time to time direct or appoint, and from and after they shall severally have arrived at that age, if more than one such child, then I give all such said annuity or sum of £100 to the child or children of the said *J. B. Bryan* equally, share and share alike, for and during the term of their joint natural lives, or the life of the survivor of them or longer liver of them." The testator then, after giving five other life annuities, proceeded as follows:—"All which said last-mentioned six annuities or annual payments I direct shall be paid to the several and respective annuitants respectively, or their several and respective assigns, whether such annuitants be of full age or otherwise at the time, as my executors, administrators, or assigns shall direct or appoint;" . . . . "with the payment of which said several debts, funeral and other expenses, as well as the said respective annuities and annual payments, I do hereby charge and make subject all my real estates with the appurtenances situate and being in *Ely Place*, in the city of *London*, with such and the like remedies by distress

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and entry for the nonpayment thereof as are usual in such cases." The testator then disposed of the residue of his real and personal estate, subject nevertheless and charged with the payment of his debts, legacies, and annuities, and funeral and testamentary expenses.

The testator died in 1797; *Susannah Bryan* in 1825, and *J. B. Bryan* in 1835. Mr. and Mrs. *Bryan* had four children; *Emma Bryan*, *Susannah Bryan* the younger, *William Bryan*, and *Hannah Cooper*.

Emma Bryan died in 1842, and *Susannah Bryan* the younger, in 1855.

By order, made on the 29th of July, 1867, Vice-Chancellor *Malins*, following a decision of Vice-Chancellor *Kindersley*, on a very similar gift in the same will (1), declared that upon the youngest child of Mr. and Mrs. *Bryan* attaining twenty-one, the annuity became divisible among the children in fourths, and that such annuity was now payable to such four children as tenants in common, or the representatives of any of them dying, until the death of the last survivor.

William Bryan appealed.

Mr. *Osborne*, Q.C., and Mr. *A. Smith*, for the Appellant, contended that the gift was a gift to the children, as tenants in common with benefit of survivorship, of an annuity continuing as long as any of the children were living. They relied on *Armstrong* v. *Eldridge* (2), and referred to *Cranswick* v. *Pearson* (3); *Begley* v. *Cooke* (4); *Wood* v. *Draycot* (5); *Scott* v. *Bargeman* (6); *Eales* v. *Earl of Cardigan* (7); *Bignold* v. *Giles* (8); *Hatton* v. *Finch* (9); *Walmsley* v. *Foxhall* (10); *Doe* v. *Abey* (11); *Jarman* on Wills (12); *Roper* on Legacies (13).

Mr. *Pontifex*, for *Hannah Cooper*.

Mr. *Glasse*, Q.C., and Mr. *Boys*, for the representatives of the

(1) Law Rep. 3 Eq. 433.
(2) 3 Bro. C. C. 215.
(3) 31 Beav. 624.
(4) 3 Drew. 662.
(5) 2 N. R. 55.
(6) 2 P. Wms. 68.
(7) 9 Sim. 384.
(8) 4 Drew. 343.
(9) 4 Beav. 186.
(10) 1 D. J. & S. 605.
(11) 1 M. & S. 428.
(12) 3rd Ed. vol. ii. p. 240.
(13) Page 1397.

deceased children, relied on *Jones* v. *Randall* (1), and referred to *Alt* v. *Gregory* (2); *Beauman* v. *Stock* (3); *Lloyd* v. *Branton* (4); *Pearce* v. *Edmeades* (5).

Mr. *Osborne*, in reply.

SIR JOHN ROLT, L. J.:—

The first thing to be done is to ascertain what, on ordinary principles of construction, is the meaning of the words of this bequest without regard to the decisions. The testator first gives "all the said annuity of £100 to the child or children of the said *J. B. Bryan*, share and share alike." So far there is no difficulty. There is a clear gift of an annuity of £100 to a class of children as tenants in common, and the only question is, for how long? Then follow words defining the duration of the annuity. They are made obscure by the inappropriate disjunctive "or," but if "or" be read "and" the language becomes plain, and there is a clear gift to the children as tenants in common of an annuity to continue till the death of the survivor of them. This appears to me the grammatical meaning of the words used. Then is there anything in the context to vary it? Reliance was placed on the gift to the children for maintenance, and it was contended that it was absurd to apply different rules during the minorities of the children and afterwards. I do not see any force in this. There would be nothing absurd in a direction that the whole income should go for the maintenance of such of the children as were infants, though they would not on majority become entitled to the whole; and whatever may be the proper construction of the clause as to maintenance, I think it does not affect the construction of the disposition to take effect when the children come of age.

In some cases, where a gift of income to a class has been followed by words referring to survivorship, the Courts have shewn an inclination to construe the gift as creating a joint tenancy, or a tenancy in common with benefit of survivorship; but it is important to observe, that in many of the authorities the duration of

(1) 1 Jac. & W. 100.
(2) 8 D. M. & G. 221.
(3) 2 Ball. & Beat. 406, 413.
(4) 3 Mer. 108.
(5) 3 Y. & C. Ex. 246.

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the annuity was one of the points to be decided, and I think that where the duration of the annuity is not clearly defined a gift over on the death of the survivor is material, but is immaterial where the duration of the annuity has already been distinctly marked out as extending till the death of the survivor. There are in such cases as the present three classes of claimants: the residuary legatees, the survivors of the annuitants, and the personal representatives of the deceased annuitants; and in considering the reported cases it is important to observe which of these classes were before the Court. In none of them, except *Jones* v. *Randall* (1), and *Bryan* v *Twigg* (2), were the representatives of the deceased annuitants present; the contest was only between the survivors and the persons claiming under the gift over. The only question to be argued between those parties was, whether the whole annuity was still subsisting, and the present question could not be fairly argued. *Armstrong* v. *Eldridge* (3) appears to have been in that position, the contest being between the survivors and persons claiming under the gift over. Moreover, the words there used, "for and during their several and respective natural lives," were much more forcible than any words here; and though I am not sure that I should have come to the conclusion that they excluded any claim by the representatives of a deceased annuitant, they might well be contended to have that effect. Of the other cases referred to, *Cranswick* v. *Pearson* (4) is nearest the present, but the representatives of the deceased annuitant were not before the Court. It was argued that *Eales* v. *Earl of Cardigan* (5) might be supported without affirming *Jones* v. *Randall*, but it appears to rest on the same principle, and to have followed that case. All the other cases referred to as opposed to *Jones* v. *Randall* stand in the position of having had no one before the Court to raise the question whether the representatives of the deceased annuitants were not entitled. I think that there is no authority which can be considered to overrule *Jones* v. *Randall*. Then comes the decision of Vice-Chancellor *Kindersley* (2) on one of the gifts in the present will. I adopt His Honour's judgment, which appears to me to put

(1) 1 Jac. & W. 100.
(2) Law Rep. 3 Eq. 433.
(3) 3 Bro. C. C. 215.
(4) 31 Beav. 624.
(5) 9 Sim. 384.

a right construction on the words, and as the decision in *Jones* v. *Randall* (1) has been recognised, I should feel justified in following it, even if opposed to *Armstrong* v. *Eldridge* (2). The appeal must be dismissed with costs.

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Solicitors for all parties: Messrs. *Boys & Tweedies.*

(1) 1 Jac. & W. 100. (2) 3 Bro. C. C. 215.

L. C.
1867
Dec. 4, 6.

HAWKINS *v.* MALTBY.

Stock Exchange—Sub-purchaser—Privity—Transfer—Pleading.

The Plaintiff, a holder of shares in a public company, agreed through his broker to sell them to a jobber for £202 10s. By the usage of the *Stock Exchange*, the transfer of the shares would not be made until a future day, and in the interval the shares might be again sold until a certain day, when the original buyer must name the person to whom the transfer was finally to be made. Accordingly, the shares were ultimately sold to the Defendant for £145 (a call having been made in the meantime), and the Plaintiff executed and gave to the Defendant a deed transferring the shares to him, the consideration named in which was £145—the difference being paid to the Plaintiff by the jobber. The Defendant never registered the transfer, and an order was made for winding up the company. The Plaintiff was compelled to pay calls upon the shares, and filed a bill for specific performance and repayment, alleging that there had been a purchase by the Defendant for £202 10s.:—

Semble, that, under the circumstances, there was a contract between the Plaintiff and the Defendant.

Held (reversing the decree of *Wood*, V.C.), that the fact of the call having been made in the interval did not invalidate the contract:

But *held*, that the contract alleged by the bill was not proved.

Appeal dismissed.

THE Plaintiffs in this case were entitled to forty shares in the *Imperial Mercantile Credit Company, Limited*, standing in the name of *Hawkins*, one of the Plaintiffs. On the 21st of March, 1866, they instructed their brokers, Messrs. *Crowley*, of *London*, to sell these shares, and Messrs. *Crowley* accordingly agreed to sell them for £202 10s., for the 30th of March, as expressed in the sale note given by Messrs. *Crowley* to the Plaintiffs, which was in the usual form, the purchaser not being named.

The purchaser was one *Mackenzie*, a broker or jobber, but by the customs of the *London Stock Exchange*, upon a sale, the ownership of shares is considered to pass from hand to hand without any transfer being executed until a particular day, called the "name day," arrives, when the name of the last purchaser is given to the broker of the original vendor, and this name is inserted in the transfer, which is thus made direct from the original vendor to the last purchaser.

This practice was followed on this occasion. On the 27th of

March, which was name day, *Mackenzie* gave the names of the Defendant *Maltby* as the purchaser, and of Messrs. *Wilkin* as his brokers. Messrs. *Crowley* accordingly prepared a deed of transfer, and sent it to the Plaintiffs, having inserted in the deed the numbers of the forty shares, but with the consideration in blank. The Plaintiff *Hawkins* executed the transfer and returned it to Messrs. *Crowley*, who, having received from Messrs. *Wilkin* £145, with 15*s.* for stamps, filled up the amount of consideration with the sum of £145, and handed the transfer deed and the share certificates of the forty shares to Messrs. *Wilkin*, who afterwards gave them to the Defendant. Messrs. *Crowley*, having received £57 10*s.*, the difference between £145 and £202 10*s.*, from *Mackenzie* on the 29th of March, paid the £202 10*s.* to the Plaintiffs, after deducting commission.

It appeared that the Defendant had, on the 26th of March, directed his brokers, Messrs. *Wilkin*, to purchase 100 shares, which they did, these forty shares being a part, and that the Defendant had paid Messrs. *Wilkin* £365 17*s.* for the 100 shares, stamps, and commission; the other sixty shares being bought from other holders.

On the same 26th of March a call of £5 a share had been made, formal notice of which was sent to the Plaintiff *Hawkins* on the 7th of April, and he sent the letter on to the Defendant, who took no notice of it.

The company stopped payment on the 11th of May, and, on the 26th of June, was ordered to be wound up. In July the solicitors of the Plaintiffs wrote two letters to the Defendant, requesting him to register the transfer, and received no answer.

On the 31st of August another call of £5 was made by the liquidator, and notice of this was sent to the Defendant, who returned no answer. The Plaintiffs paid the second call in October, and then amended a bill which they had filed against the Defendant in August. The amended bill stated in part as above stated, but stated incorrectly, that the Plaintiffs, on the 21st of March, through their brokers, Messrs. *Crowley*, sold the forty shares to the Defendant, through his brokers, Messrs. *Wilkin*, for £202 10*s.*, the sale and purchase to be completed on the 30th of March; and that, on the 28th of March, the Plaintiff *Hawkins* executed a deed of

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transfer of the shares to the Defendant in consideration of the sum of £202 10s.; and the bill prayed that the Defendant might be decreed specifically to perform the contract so entered into by him, and to repay to the Plaintiffs the amount paid by them for calls, and to cause the deed of transfer to be registered, or otherwise to indemnify the Plaintiffs.

The Defendant, by his answer, submitted to the Court whether he ought to be compelled to register the shares or to have paid the calls, and denied that he had entered into any contract with the Plaintiffs, or either of them, and alleged that the consent of the company or directors to the transfer had never been obtained, which the articles of association appeared to require.

The Plaintiffs had, in December, paid the amount required by the first call.

The cause came on to be heard before the Vice-Chancellor *Wood*, who dismissed the bill with costs on the ground that the Defendant was not aware when he bought the shares of the call made on the 26th of March. The case is reported (1).

The Plaintiffs appealed.

Mr. *G. M. Giffard*, Q.C., and Mr. *Townsend*, for the Appellants:—

The Defendant does not pretend to say that he was not aware of the call, or was deceived. All that he alleges by way of defence is, that there was no contract between him and the Plaintiffs; but the acceptance of the transfer was enough, and he must be taken to know the rules of the *Stock Exchange: Stray* v. *Russell* (2); *Wynne* v. *Price* (3); *Shaw* v. *Fisher* (4); *Walker* v. *Bartlett* (5). How can the Defendant say there is no privity between him and the Plaintiffs? They have done all they can, and it is only his neglect to register the transfer which leaves the transaction incomplete. If the company had been prosperous, of course he would have registered, and could have done so for six weeks after the purchase. A Defendant must not be allowed to avail himself of his own default in this way. According to his contention, we

(1) Law Rep. 4 Eq. 572.
(2) 5 Jur. (N.S.) 1295.
(3) 3 De G. & Sm. 310.
(4) 5 D. M. & G. 596.
(5) 18 C. B. 845, 2 Jur. N.S. 1064.

are bound and he is not. Whether the transfer was in blank or not cannot signify in equity.

Mr. *Druce*, Q.C., and Mr. *Bush*, for the Defendant:—

Is there a contract between the Plaintiffs and the Defendant or not? At present the Plaintiff *Hawkins* is the registered holder of the shares, and must prove the contract. The allegation in the bill is not proved, for there was certainly no such contract. The call was made before the transfer was executed, and then it could not be registered without payment of the call: *Reg.* v. *Londonderry and Coleraine Railway Company* (1); and the Plaintiff never paid the call until after the company was wound up, when the shares could not be transferred. The only contract, if any, between the parties is a sale for £145, and how can the Plaintiffs ask performance of that when they have received £202 10*s.*? Moreover, nothing passed by the deed, it being in blank: *Sheppard's* Touchstone (2). Such a contract with a sub-purchaser cannot be enforced: *Chadwick* v. *Maden* (3); *Tasker* v. *Small* (4).

Mr. *Giffard*, in reply.

LORD CHELMSFORD, L.C.:—

The mode in which this case has been dealt with, both before the Vice-Chancellor and in the argument before me, is not a little extraordinary.

The bill was filed for the purpose of compelling the Defendant to register himself as a shareholder of forty shares in the *Imperial Mercantile Credit Company*, which the Plaintiff *Hawkins* alleges had been purchased from him by the Defendant. The only defence made by the Defendant was that he never entered into any contract with the Plaintiff to purchase these forty shares, or any of them. The Vice-Chancellor was of opinion that there was a contract between the parties, and that though the Plaintiff did not in the first instance agree to sell to the Defendant nor the Defendant to purchase from the Plaintiff, yet afterwards they were brought together, and the Defendant adopted the whole contract and became the purchaser; but His Honour, upon grounds which, as

(1) 13 Q. B. 998.
(2) Vol. i. p. 68.
(3) 9 Hare, 188.
(4) 3 My. & Cr. 63.

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far as the report goes, do not appear to have been brought forward in argument, decided that in consequence of there having been a call made before the alleged purchase by the Defendant, of which call he had no notice, he was entitled to repudiate the contract; and upon that ground, and that alone, His Honour dismissed the bill with costs.

In the argument upon the present appeal, Mr. *Druce* stated distinctly at the outset that the question was entirely of fact, and depended upon whether there was a contract between the parties or not, and he, therefore, stood upon the ground rejected by the Vice-Chancellor, and if he did not entirely pass by the only ground upon which His Honour decided the case, he certainly treated it as completely subordinate. Now, no doubt, it is quite competent to the Defendant to take up that position, though he must be considerably embarrassed by so doing. The result may also be that I may have to decide upon a ground which is different from any yet brought forward, and which has certainly not been made prominent in the argument on either side.

The Vice-Chancellor held that the Defendant was entitled to repudiate the contract because there was a call at the time of the purchase, of which call he was not aware, and therefore could say that he had been deceived. Now, if the case had to be determined upon that ground, I confess that I should not be disposed to fall in with the view taken by the Vice-Chancellor. The transfer was made on the 28th of March. There had been a call on the 26th, the very day on which the purchase was made by the broker of the Defendant—whether that is to be considered a contract I will not stop to consider—but on the 28th of March the transfer was made at a price for the shares which shews that they were at a discount, and that it was a purchase with a knowledge that £5 only had been paid upon the shares, and of course the purchaser and his broker must have known that calls might be expected, and were probably imminent. The purchaser has formal notice of the call on the 7th of April, but he does not repudiate the contract or return the shares, and, as Mr. *Giffard* suggested, if the shares had gone to a premium he would have insisted upon the transfer being completed.

The company, however, failed in May, and an order for winding it up was made, but it is very remarkable that from the beginning

to the end of these transactions, and even when he is challenged by the bill, the Defendant never sets up as his defence that he had been deceived and that he was not aware of the existence of the call, and he never alleged that as a ground upon which he was entitled to repudiate the contract. It appears to me that if the question had depended entirely upon this right of the purchaser to repudiate, I could not agree with the view of the Vice-Chancellor, and I should have been compelled to reverse the decree upon the ground on which he has placed it.

But I must next consider the objection made by the Defendant, but not adopted by the Vice-Chancellor, that there was no contract between him and the Plaintiff. Now, Mr. *Druce* said, and said truly, that this was a question entirely of fact, and he argued that there was no identity between that which the Plaintiff sold and that which the Defendant bought, in several particulars; for instance, as to the date, the number of shares, the consideration, and the time of completion. The argument is very ingenious, but rather fallacious when we consider what is the evidence of the usage upon the *Stock Exchange*, which if not familiar to the Defendant, was, at all events, familiar to his brokers, which is the same thing. He knew that shares frequently passed through several hands before they came into the possession of the actual purchaser to whom the transfer would be made, and he knew that the transfer would not be made by the person from whom he purchased, but by the holder of the shares. Therefore, the Defendant knowing this usage, and receiving and retaining the deed of transfer and certificates, acquiesces in the transaction, and becomes in fact the purchaser of the shares from the vendor who transferred them to him. Therefore, if this depended upon the question whether there was a contract between the parties, I should have agreed with the Vice-Chancellor that, from the mode in which these dealings take place upon the *Stock Exchange*, the acceptance of the transfer and the retaining the deed and certificates would be sufficient proof of the acquiescence of the Defendant in the transaction, and of the agreement between the Plaintiff and Defendant. But then it was said that there could be no legal transfer of the shares because a call had been made and not paid, and that, according to the case of *Reg.* v. *Londonderry and Coleraine Railway*

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Company (1), there could be no legal transfer of the shares under these circumstances.

Now *Reg.* v. *Londonderry and Coleraine Railway Company* depended upon the *Companies Clauses Act*, 1845, sect. 16 of which says, that "No shareholder shall be entitled to transfer any share after any call shall have been made in respect thereof until he shall have paid such call." It was an application for a mandamus to the company to register shares which had been transferred at the time when a call remained unpaid, and the company undoubtedly were not bound to register the transfer. But that is a totally different case from the question of transfer as between transferor and transferee; for the shareholder can transfer the shares as between himself and his transferee, though he cannot compel the company to register the transfer. Then it was said that the articles of association provided that the directors might decline to register any transfer from any member who was indebted to the company, or if the transferee was not approved of by the directors, but the same observation applies to this argument, the directors may decline to register, but the transaction is complete as between transferor and transferee.

Then it was said that a transfer executed in blank could not be a valid transfer, and for that proposition the case of *Tayler* v. *Great Indian Peninsula Railway Company* (2) was cited. But that case does not affect the question in the slightest degree, because there the Plaintiff had 120 shares and also 60 additional shares, and the question arose as to the 120 shares of which he had never authorized the sale. There, however, the broker was authorized to fill up the blanks, and having done so with this authority the transfer was complete, and therefore that case does not affect the question.

But then comes another question, upon which I feel compelled to come to a conclusion in favour of the decree, though upon totally different grounds from those mainly relied upon in the argument. It is clear that a Plaintiff must proceed *secundum allegata et probata*. Now by this bill the Plaintiffs seek specific performance of an agreement with the Defendant for the sale of these forty shares in consideration of a sum of £202 10*s*., and that par-

(1) 13 Q. B. 998. (2) 4 De G. & J. 559.

ticular contract the Plaintiffs pray that the Defendant may be decreed specifically to perform. But, is there proof of any such contract? The only proof given is this transfer, which is expressed to be in consideration of £145 paid to the Plaintiff *Hawkins* by the Defendant; and if I were to make a decree for specific performance of the contract alleged by the bill, I should compel the performance of a contract into which the parties never entered. The proof of the contract alleged in the bill entirely fails, and it is, therefore, impossible that the Plaintiffs should be entitled to relief on this bill. Whether upon a bill properly framed the Plaintiffs would have been entitled to relief, it is unnecessary to say; but, under the circumstances, I feel myself compelled to say that the Plaintiffs have failed in their proof of the contract of which they seek specific performance, and therefore I must affirm the decree and dismiss the appeal, but certainly without costs, and without prejudice to any other bill which may be filed (1).

Solicitors for the Plaintiffs: Messrs. *Hurford & Taylor*.
Solicitor for the Defendant: Mr. *J. Crowdy*.

STAMMERS *v.* ELLIOTT.

Proof under Bankruptcy—Set-off—Legal Personal Representative—Retainer.

A bankrupt was indebted to the estate of a testator, and was also entitled as one of the residuary legatees of the same testator, and also to distributive shares as next of kin of three other residuary legatees. The executor of the testator proved the debts under the bankruptcy and received a dividend on the proof:—

Held (reversing the decree of *Malins*, V.C.), that the executor had thereby abandoned the right to retain the debt out of the direct or derivative shares of the bankrupt in the testator's residuary estate.

But *semble*, if the executor had not proved in the bankruptcy, the personal representative of the testator would have been entitled in Equity to retain the amount of the debt against the bankrupt's direct and derivative shares in the residue.

THIS was an appeal from a decision of Vice-Chancellor *Malins* (2). The bill was filed by the Plaintiffs, as assignees in bankruptcy of

(1) See *Grissell* v. *Bristow*, Law Rep. 3 C. P. 112.

(2) Law Rep. 4 Eq. 675.

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William Payne, against *Emma Elliott* and her husband, for the recovery of five sums of money to which the bankrupt was entitled under a settlement and will, and three intestacies, under the following circumstances:—

A sum of £465 7*s.* 6*d.* was due to the bankrupt under a settlement made on the 16th of October, 1818, by *Joseph Tiercelin*, in favour (amongst others) of the four children of *Mary Ann Payne*, the bankrupt being one of the sons, and the Defendant, *Emma Elliott*, one of the daughters, of Mrs. *Payne*. *John Joseph Tiercelin* (with another person whom he survived) was the trustee of this settlement.

Under the will of the settlor, *Joseph Tiercelin*, dated the 2nd of April, 1830, the bankrupt became also entitled, as one of the residuary legatees in remainder after the death of his mother, *Mary Ann Payne*, to a sum of £223 19*s.* 1*d.*

Mary Ann Payne died intestate, and the Defendant, *Emma Elliott*, became her administratrix. Under this intestacy the distributive share of the bankrupt amounted to £229 15*s.* 6*d.*

Joseph Payne, one of the sons of *Mary Ann Payne*, and a brother of the bankrupt, and one of the residuary legatees under the will of *Joseph Tiercelin*, died intestate, and administration of his estate was granted to his sister, the Defendant, *Emma Elliott*. The distributive share of the bankrupt in his brother's estate amounted to £172 6*s.* 8*d.*

Mary Ann Payne, the sister of the bankrupt, and another of the residuary legatees under the will of *Joseph Tiercelin*, also died intestate, and administration of her estate was granted to her sister, the Defendant, *Emma Elliott*. The bankrupt was entitled under this intestacy to a sum of £287 4*s.* 5*d.*

On the other hand, the bankrupt was liable for the following sums:—

In the year 1834, *Joseph Tiercelin*, the settlor and testator, lent the bankrupt the sum of £850, and at the same time *John Joseph Tiercelin*, the trustee under the settlement, lent him the sum of £150. After the death of *Joseph Tiercelin*, *John Joseph Tiercelin* and his co-executor took from the bankrupt a bond, dated the 9th of February, 1837, to secure the repayment of the sum of £850 advanced and lent to him by the testator, and at the same time

the bankrupt gave to *John Joseph Tiercelin* a promissory note for the £150 which he had lent him.

William Payne was adjudicated a bankrupt in the month of March, 1856. *John Joseph Tiercelin* came in under the bankruptcy and proved for the sum of £1000, £850 of which was due to him as executor of *Joseph Tiercelin*, and £150 on his own account, and he received a dividend of £9 7*s.* 6*d.* upon these debts.

John Joseph Tiercelin died on the 26th of April, 1859, having made a will and appointed an executor; but the executor having renounced probate, administration with the will annexed of *John Joseph Tiercelin* was granted to the Defendant, *Emma Elliott*, who also took out administration *de bonis non* to *Joseph Tiercelin*, the original testator.

The Defendant, Mrs. *Elliott*, by means of the various grants of administration to her, became the legal personal representative of *Joseph Tiercelin* the testator, and of *John Joseph Tiercelin*, the trustee under the settlement, and the executor under the will of *Joseph Tiercelin*. In these different capacities she was entitled to the sum of £850 as part of the estate of *Joseph Tiercelin*, and of the sum of £150 as part of the estate of *John Joseph Tiercelin*, both which sums were due from the bankrupt's estate. She was also liable, as representing *John Joseph Tiercelin*, to pay to the assignees of the bankrupt the amount of his share of the trust property to which he became entitled as one of the children of *Mary Ann Payne* under the settlement of the 16th of October, 1818, and also the bankrupt's share of the residue given to her by the will of *Joseph Tiercelin*, and, as representing her intestate mother, brother, and sister, the Defendant was liable to the estate of the bankrupt for his distributive shares under these three intestacies. Under these circumstances, the Defendants claimed to retain a sum equal to the two debts of £850 and £150 due from the bankrupt.

The Vice-Chancellor thought that the Defendants were not entitled to retain any part of the moneys in their hands, except the sum of £223 19*s.* 1*d.*, being the amount of the bankrupt's residuary share under the will of *Joseph Tiercelin*, in respect of the debt of £850 due to the testator; and, it having been insisted that the claim of the £850 by *John Joseph Tiercelin* under the bankruptcy

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had satisfied and put an end to that debt, His Honour was of opinion that the proof of the debt by *John Joseph Tiercelin* did not extinguish it as against the residuary legatees.

From this decision, except as to the sum of £223 19*s.* 1*d.*, the Defendants appealed.

Mr. *Glasse*, Q.C., and Mr. *Whitbread*, for the Defendants:—

The proof in the bankruptcy does not affect the right of retainer; for *John Joseph Tiercelin*, being a trustee, had no power to give up the right of retainer to the prejudice of his *cestuis que trust*: *Ex parte Dicken* (1); *Ex parte Turney* (2).

[On the question of retainer they admitted that they could not claim such a right in respect of the debt of £150 which was due to *John Joseph Tiercelin* personally. As to the bond debt of £850 due to him as executor of *Joseph Tiercelin*, they cited *Bousfield* v. *Lawford* (3); *Courtenay* v. *Williams* (4).]

Mr. *De Gex*, Q.C., and Mr. *Jason Smith*, for the Plaintiffs:—

We have not appealed from the decision of the Vice-Chancellor respecting the sum of £223 19*s.* 1*d.*; but as the Defendants have appealed against part of the decree, it is open to us to object to any other part. And we contend that as to this, as well as all the other sums with respect to which a right of retainer is claimed, such right, if it ever existed, has been extinguished by the proof under the bankruptcy. An executor is in a different position to an ordinary trustee, as he has the dominion over the estate and has power to release debts: *Ex parte Solomon* (5); *Ex parte Downes* (6); *Ex parte Hornby* (7); *Ex parte Eggington* (8); *Kingsford* v. *Swinford* (9).

[On the question of retainer they referred to *Freeman* v. *Lomas* (10).]

Mr. *Glasse*, in reply.

(1) Buck, 115.
(2) 3 M. D. & De G. 576.
(3) 1 D. J. & S. 459.
(4) 3 Hare, 539.
(5) 1 Gl. & J. 25.
(6) 18 Ves. 290.
(7) Buck, 351.
(8) Mont. 72.
(9) 4 Drew. 705.
(10) 9 Hare, 109, 114.

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Feb. 11. LORD CHELMSFORD, L.C., after stating the facts set forth above, continued:—

With respect to the claim to retain for the £150 due to the estate of *John Joseph Tiercelin*, it was very properly abandoned in argument. The liability of the Defendant is, as the representative of *John Joseph Tiercelin*, the trustee under the settlement and executor under the will, to the *cestuis que trust* and residuary legatees; the £150 is due to the estate of *John Joseph Tiercelin* in his own right, and, as Vice-Chancellor *Turner* said in the case of *Freeman* v. *Lomas* (1), "except under special circumstances Courts of equity have never allowed cross-demands existing in different rights to be set the one against the other."

With respect to the £850 due from the bankrupt's estate to the estate of *Joseph Tiercelin*, there is this peculiarity attending it—that it enters into and forms part of the residue under the will of *Joseph Tiercelin*, and also goes to increase the amount of the estates of the several intestates. The bankrupt would thus be entitled as one of the residuary legatees to one-fourth of his own debt, and also to his share of the benefit arising from the addition it would make to the shares of the intestate residuary legatees. Upon this state of things it would be inequitable that the assignees of the bankrupt should be allowed to claim everything to which the bankrupt is entitled under the will and the intestacies, and yet not be compelled to bring in what is due from him to the estate. If, therefore, the £850 were a subsisting debt, I should have thought that it must have been brought into account by the assignees, and that the bankrupt's share in the residue under the will and under the intestacies could only be ascertained by first taking the £850, part of *Joseph Tiercelin's* estate, and then calculating the amount of the bankrupt's share in the residue and in the intestacies upon that footing. But I am compelled to differ from the Vice-Chancellor's opinion that the proof of the debt by *John Joseph Tiercelin* did not extinguish it against the residuary legatees. This is a very different case from *Ex parte Dicken* (2), where Lord *Eldon* held that the proof of a debt under a commission of bankrupt by a trustee did not deprive the *cestuis que trust* of a

(1) 9 Hare, 109, 114. (2) Buck, 115.

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lien which they personally had in respect of the debt. But here the proof of the debt of £850 against the bankrupt's estate was made by *John Joseph Tiercelin*, to whom the debt was due in his character of executor. Now, although a trustee may not be allowed to prejudice the *cestuis que trust* by an act of this kind, yet an executor has an absolute power over the debts due to his testator, and may deal with them as he pleases. If he, therefore, proves a debt under a bankruptcy, it has the same effect as if he were proceeding in his own right, and consequently the debt must be held to be satisfied. It is unfortunate for the Appellants that, the whole case being open on their appeal, the effect of it is that they lose the benefit of that part of the decree which the Vice-Chancellor has pronounced in their favour.

I must, therefore, vary the decree in that part of it which states that the Defendants are entitled to retain the £223 19*s.* 1*d.*, the share of the bankrupt in his own right under the will of *Joseph Tiercelin* in satisfaction *pro tanto* of the sum of £850.

The costs were given by the Vice-Chancellor to the Defendants in respect of the £223 19*s.* 1*d.* found in their favour; but as I have held that they have failed in that respect also, the decree must be varied also as to costs: and the appeal must be dismissed with costs.

Solicitors for the Plaintiffs: Messrs. *Lawrance, Plews, & Boyer.*
Solicitor for the Defendants: Mr. *Kennedy.*

L. C. 1867 Nov. 23.

DAVIES *v.* MAC-HENRY.

Practice—Lord Mayor's Court—Certiorari.

A writ of *certiorari* will be issued to remove a suit out of the Equity side of the Lord Mayor's Court into the Court of Chancery on a bill being filed for the purpose, and evidence being given that neither the Plaintiff nor the Defendant, nor the subject-matter of the suit, were within the jurisdiction of the Lord Mayor's Court, and that the cause of action did not arise there.

Proceedings on the return to the writ.

RICHARD MAC-HENRY, a banker at *Paris*, brought an action in the Lord Mayor's Court against Mrs. *Mary Anne Elizabeth*

Davies, for the sums of £147 and of £80 (which he had advanced upon drafts drawn on bankers in the City of *London*), and caused an attachment to be issued out of the Common Law side of that Court against the banking account of Mrs. *Davies*, at Messrs. *Robarts & Co.* Mrs. *Davies* put in common bail, and paid the sum of £80 into the Lord Mayor's Court, and pleaded coverture. *Mac-Henry* proceeded with the action, and was nonsuited. He thereupon, on the 30th of October last, filed a bill on the Equity side of the Lord Mayor's Court, stating as above mentioned, and that he believed that Mrs. *Davies* was possessed of separate estate, but that he could not at common law recover from her the debts due to him, and praying that he might be paid those debts out of her separate estate.

Mrs. *Davies* thereupon filed in the Court of Chancery a bill of *certiorari* against *MacHenry* and Mr. *Davies*, the husband of Mrs. *Davies*, stating the bill in the Lord Mayor's Court, and that at the time of filing that bill neither *MacHenry* nor Mrs. *Davies* nor her husband were resident within the jurisdiction of the Lord Mayor and his brethren the Aldermen of the City of *London*, and that the cause of action did not arise within the jurisdiction of the said Lord Mayor and Aldermen, unless the facts of the drafts having been drawn on bankers in the City gave jurisdiction, and that Mrs. *Davies* had not any separate property within that jurisdiction, unless the £80 so paid into the Lord Mayor's Court was to be considered such. And the bill prayed for a writ of *certiorari* to remove the bill filed in the Lord Mayor's Court, and all proceedings thereon, into the Court of Chancery.

Mr. *Freeling* now moved *ex parte* for the writ, on affidavits verifying the statements in the bill. As to the practice, he cited *Maddock's* Chancery Practice (1) and *Edwards* v. *Bowen* (2). As to the jurisdiction, *Mayor of London* v. *Cox* (3); *S. C.* on appeal (4). By the Act (20 & 21 Vict. c. clvii.) regulating the practice in the Lord Mayor's Court, an objection to the jurisdiction can only be taken by plea; and as all the facts are stated in the bill, we cannot plead them.

(1) Vol. i. pp. 14, 251.
(2) 2 Russ. 153.
(3) 2 H. & C. 401; 9 Jur. (N.S.) 800.
(4) Law Rep. 2 H. L. 239.

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The LORD CHANCELLOR said that the writ might issue at the peril of the applicant, as the Defendant could always move to quash the writ.

The writ of *certiorari* was accordingly issued, and the Lord Mayor's Court returned the record; whereupon, on motion before *Wood*, V.C., it was ordered that the record should be filed, and that it should be referred to the Chief Clerk to inquire and certify whether the Plaintiff could prove the suggestions in her bill: *Wyatt's* Practical Register (1); *Maddock's* Chancery Practice (2).

The Defendant did not appear, and the Plaintiff produced evidence before the Chief Clerk in support of the suggestions in her bill; and, not being satisfied with the certificate of the Chief Clerk, the Plaintiff, on the 31st of January, moved before the Vice-Chancellor to have the certificate varied, and made to certify that the Plaintiff had proved the suggestions in her bill.

The certificate was ordered to be varied accordingly, and

Mr. *Freeling* then moved before the Vice-Chancellor to have the bill retained, which was ordered accordingly: *Wyatt's* Practical Register (3); *Maddock's* Chancery Practice (4).

Solicitors: Messrs *Cookson, Wainewright, & Co.*

(1) Page 82.
(2) Vol. i. p. 251.
(3) Page 83.
(4) Vol. i. p. 251.

PATCH *v.* WARD.

L. JJ.
1867
Dec. 13, 14, 16.

Bill to set aside Decree for Fraud—Assignment pendente lite not disclosed—Foreclosure—Affidavit of non-payment—Costs not following the Event.

To set aside on the ground of fraud a decree signed and enrolled, actual positive fraud ought to be shewn. Mere constructive fraud is not sufficient, at all events after long delay.

W., as solicitor of *V.*, a second mortgagee, received the rents of the mortgaged property. The first mortgagees obtained a decree for foreclosure, and a first report was made finding what was due to them. *W.* paid them off with his own money, in *V.'s* name, and also paid off *V.* The proceedings went on without *W.'s* interest being disclosed, and shortly afterwards a second report was made finding what was due to *V.* in respect of his own security, and of what he had paid to the first mortgagees, after allowing for the rents received by him. *P.*, the mortgagor, not paying this, an order absolute for foreclosure was made, *V.* making the usual affidavit that he had received nothing towards payment of the sum found due. Between the second report and the making this affidavit *W.* had gone on receiving rents. He was entitled to an undisputed third mortgage, given him by *P.*, on the same property. *P.*, twelve years afterwards, filed a bill to impeach the order for foreclosure absolute as having been obtained by fraud:—

Held, that it was not the duty of *W.*, when he became owner of the mortgages, to disclose his interest, and make himself a party to the proceedings; and that, although the affidavit made by *V.* was in the circumstances irregular, the irregularity did not prove any fraudulent design on the part of *W.*, as it was a doubtful question whether he was not entitled to retain the rents towards satisfaction of this third mortgage, which he claimed to do; and if he was so entitled *V.'s* affidavit was substantially correct:

Held, therefore (affirming the decree of *Stuart*, V.C.), that the decree for foreclosure absolute could not be set aside.

Circumstances under which costs should not follow the event considered.

THIS was an appeal by the Plaintiff from an order of Vice-Chancellor *Stuart* dismissing his bill, which was filed to set aside, on the ground of fraud, an absolute decree of foreclosure signed and enrolled, and to redeem the mortgaged property.

At the time when the suit in which the decree for foreclosure had been obtained was instituted, the property in question was subject to a first mortgage for £5500, vested in *Leaf*, *Ward*, and *Bailey*, and to a second mortgage for £1000, vested in *L. Vulliamy*, the equity of redemption being in *Patch*, the mortgagor. The

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bill was filed by *Leaf, Ward,* and *Bailey,* in May, 1847, for foreclosure. On the 11th of October *Patch* signed an authority to the tenants to pay to *Ward* their rents then due. *Ward* was at that time the solicitor of *Vulliamy.* From this time *Stemp,* a clerk of *Ward,* received the rents, giving receipts sometimes in his own name, sometimes in the name of *Ward,* and sometimes in the name of *Vulliamy.* On the 11th of May, 1848, a decree for foreclosure was made. On the 16th of June, 1848, the Master made his report, finding what was due to the first mortgagees up to the 1st of December, 1848, and appointing that day for payment by *Vulliamy.* The money was paid accordingly on that day, and the security of the Plaintiffs transferred to *Vulliamy. Ward,* who had induced both the first mortgagees and *Vulliamy* to lend the moneys on these securities, considered himself bound to indemnify them; he therefore took to the securities, and the money paid to the first mortgagees in the name of *Vulliamy* was, in fact, paid by *Ward.* On the 4th of December *Ward* paid to *Vulliamy* what was due to him. No notice was taken in the suit of the interest thus acquired by *Ward;* but the proceedings went on as if nothing had taken place but a redemption of the first mortgagees by *Vulliamy,* and a few days afterwards, in the same month, the Master made his further report, by which he found that *Vulliamy* had been in receipt of the rents since the 6th of October, 1847; and from that day to the 18th of November, 1848, had received £716; and, after allowing for this, he found that the total amount of what would be due on the 15th of March, 1849, to *Vulliamy* for principal, interest, and costs, including what he had paid to the first mortgagees, was £6870 9*s.*, which the Master appointed to be paid on the 15th of March, 1849.

On the 16th of March, 1849, an order absolute for foreclosure was made on the usual affidavit by *Vulliamy,* in which he deposed as follows:—

"I make oath and say, that neither the above-named Defendant *Charles Patch,* nor any person or persons on his account or behalf, have or hath paid to me, or to any person or persons by my direction or on my account, or for my use, the sum of £6870 9*s,* or any part thereof, reported due and directed to be paid to me by the report made in this cause, and bearing date the

21st of December, 1848; but I say that the whole of the said sum of £6870 9*s.* now remains wholly due and unpaid."

This order, which had subsequently been signed and enrolled, was the order impeached.

It was shewn in the present suit that, between the making of the Master's second report and the order absolute for foreclosure, the receipt of rents by *Ward* had gone on, and that during that period £161 had been received; so that if this receipt was in right of *Vulliamy* the affidavit, though true in the letter, was, in substance, contrary to the fact. The explanation which *Ward* gave of his not having brought this receipt of rents before the Master was, that besides his having become equitable owner of the two mortgages, he was entitled to a subsequent equitable charge on the same property given him on the 15th of October, 1847, by *Patch*, and considered himself entitled to apply the last-mentioned rents towards satisfaction of that equitable charge, and accordingly to treat them as not applicable in reduction of what was due on *Vulliamy's* mortgage.

The Plaintiff *Patch* had, in the summer of 1848, gone to *America*, and did not return till 1860. After his return he, on the 11th of August, 1862, filed the present bill against *Ward* alone to impeach the decree of the 11th of May, 1848, and the order absolute for foreclosure, on the ground of their having been fraudulently and improperly obtained. *Ward* demurred, and the demurrer was allowed by Vice-Chancellor *Stuart* (1). This decision was appealed from, and *Ward* not opposing, an order overruling the demurrer was substituted. He put in his answer, and in 1865 the bill was amended by adding *Vulliamy* as a Defendant.

The case of fraud was supported on two grounds, one of which rested on circumstances which, as they present nothing calling for a report, are not alluded to above.

Vice-Chancellor *Stuart* dismissed the bill with costs.

Mr. *Bacon*, Q.C., and Mr. *Nalder*, for the Appellant, referred to *Buchanan* v. *Greenway* (2); *Solomon* v. *Solomon* (3); *Johnson* v. *Thomas* (4).

(1) 4 Giff. 96, where a very full statement of the bill is to be found.

(2) 12 Beav. 355.

(3) 13 Sim. 516.

(4) 11 Beav. 501.

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Mr. *G. M. Giffard*, Q.C., and Mr. *Bevir*, for *Ward*, referred to *Gould* v. *Tancred* (1); *Bowen* v. *Evans* (2); *Carew* v. *Johnston* (3).

Mr. *Greene*, Q.C., for *Vulliamy*.

Mr. *Bacon*, in reply.

The nature of the arguments sufficiently appears from the judgments.

LORD CAIRNS, L.J.:—

The bill in this cause is filed to set aside a decree absolute for foreclosure made as long ago as the month of March, 1849, and enrolled a few years subsequently. Being a decree signed and enrolled, the matter covered by it has become solemnly *res judicata* between the parties to the suit, and the decree must remain, unless it can be set aside either upon the ground of error apparent upon the face of it, upon the ground of new matter subsequently discovered, or upon the ground of fraud. If it is to be impugned for error apparent upon the face of it, or for new matter relevant to the issues in the cause, that must be done by bill of review, the bill in the former case being filed without any leave of the Court, in the latter not without leave, and in order to obtain that leave the applicant must satisfy the Court that the new matter is relevant to the issues, and could not with reasonable diligence have been earlier discovered. There is here no error apparent upon the face of the decree, neither has any leave been applied for or obtained to file a bill of review upon the ground of new matter discovered. The third ground alone remains, and it is that on which the bill is filed, that the decree was obtained by fraud.

Now it is necessary to bear in mind what is meant and what must be meant by fraud, when it is said that you may impeach a decree signed and enrolled on the ground of fraud. The principle on which a decree may be thus impeached is expressed in the case which is generally referred to on this subject, *The Duchess of Kingston's Case* (4), where the Judges, being consulted by the House

(1) 2 Atk. 533.
(2) 1 J. & Lat. 178.
(3) 2 Sch. & Lef. 280, 308.
(4) 11 Hargr. State Trials, 262; 2 Sm. L. C. 593, 601.

of Lords, replied to one of the questions, "Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of justice. Lord *Coke* says it avoids all judicial acts, ecclesiastical or temporal." The fraud there spoken of must clearly, as it seems to me, be actual fraud, such that there is on the part of the person chargeable with it the *malus animus*, the *mala mens* putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him. And that that is so, is, I think, further illustrated by looking at the form of decree which this Court is in the habit of making when a bill to impeach on the ground of fraud a decree signed and enrolled is successful. In *Carew* v. *Johnston* (1) Lord *Redesdale* made a declaration in these words: "Declare that the several decrees and proceedings in the said cause instituted by the said late Defendant, *John Pine*, deceased, against the said *Thomas Pyke*, deceased, and others, appear to have been erroneous and unjust, and to have been fraudulently obtained and had by the said *John Pine* and by the Defendant *Johnston* (who was the assignee of the said *John Pine* of the benefit of such suit, and the person really interested therein) by taking advantage of the real imbecility of mind of the said *Thomas Pyke*, and the embarrassed state of his affairs in *Ireland*, and the negligence and misconduct of those who, by reason of the incapacity of the said *Thomas Pyke*, took upon them the care and custody of his person and fortune, and treated him as a person of unsound mind and incapable of managing his affairs, without obtaining any authority to do so by suing out any commission either in *England* or *Ireland* in the nature of a writ to inquire of the idiotcy or lunacy of the said *Thomas Pyke*." I apprehend the fraud, therefore, must be fraud which you can explain and define upon the face of a decree, and that mere irregularity, or the insisting upon rights which, upon a due investigation of those rights, might be found to be overstated or overestimated, is not the kind of fraud which will authorize the Court to set aside a solemn decision which has assumed the form of a decree signed and enrolled.

[His Lordship then, after disposing of the other ground of alleged fraud which has been alluded to above, continued:—]

(1) 2 Sch. & Lef. 308.

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I now come to a part of the case which presents much more difficulty. I mean the occurrences between the Master's second report in December, 1848, and the decree absolute for foreclosure in March, 1849. It appears that shortly before the second report *Ward* had paid out of his own moneys everything that was due to the first mortgagees and to *Vulliamy*. Of course that was done on the footing that *Ward* should become entitled to whatever rights the first and second mortgagees had in respect of the property, whether under the decree of foreclosure or otherwise. Now it is said, that at this stage of the proceedings it was the duty of *Ward* to have informed the Court that the first mortgagees and *Vulliamy* had no longer any interest in the property, and that he himself was the owner of their incumbrances. No doubt he might have done so, he might have made himself, by some proper form of pleading, a party to the suit, and have represented on the face of the pleadings the fact of the transfer to him of the interest of the first and second mortgagees. But in my opinion he was not bound to do so. He might be content to leave those who had become his trustees to conduct and conclude the litigation, he having confidence in them, and they not requiring him to come in *propriâ personâ* upon the record; and there is no rule of the Court, that I am aware of, which requires a person acquiring an interest in that way to state to the Court that such change of interest has taken place; though of course he frequently, perhaps generally, does so, because the transferee in most cases is anxious to become a party to the litigation in order to maintain his own rights.

After *Ward* had thus become the owner of the first and second mortgages without making himself in name a party to the litigation, he, between the second report of the Master and the decree absolute for foreclosure, received a sum of £161 in respect of the rents of the mortgaged property. Now, having regard to the way in which the receipt of the rents commenced, and to the finding of the Master upon his second report, *primâ facie* the inference would be, that the rents received subsequently to the second report and before the decree absolute for foreclosure, were received in the same right, in the same character, and as a continuation of the receipt mentioned in the report; and if the receipt of rents after the second report and before the decree absolute was the receipt of

rents by *Vulliamy*, there is no doubt that such receipt ought to have been taken into account, and that there should have been a fresh reckoning and a fresh report by the Master before the final decree for foreclosure. It is at this point that the difficulty of the case arises.

It is contended, on the part of the Plaintiff, that *Vulliamy*, who had ceased to have any beneficial interest in the property, was not the proper person to make the affidavit on which the decree for foreclosure absolute was obtained; that though *Vulliamy* could say with truth that he had not been paid any part of this sum of £6870 9*s*., *Ward* could not with truth have said so, if he had made the affidavit; and that the making of the affidavit by *Vulliamy* instead of by *Ward* was resorted to in order that the truth might not appear to the Court.

Ward's case is in substance this:—"A few days before the Master made his second report I became the absolute owner in equity of both the incumbrances on this property. I had, in addition to those first and second mortgages, an equitable charge upon the same property, under a memorandum of the 15th of October 1847. I admit that I received the rents to the amount of £161 between the second report and the final decree, but I applied them, and I claim the right to have applied them, not in payment of the first mortgage, not in payment or reduction of the second mortgage, but in payment of this equitable charge which I thus possessed from *Patch*."

Now if the fact of the transfer of interest in the first and second mortgages, and the claim of *Ward* to retain the rents in respect of his third charge, had been before the Court, it is obvious that two alternative views might have been contended for. On the one hand, it might have been said that the receipt of these rents before the second report having had its inception in *Vulliamy*, and for the benefit of *Vulliamy*, and having been found by the Master to have been a receipt by *Vulliamy*, the subsequent receipt of rents was impressed with the same character, must be considered to have been the receipt of rents still by *Vulliamy*, and, therefore, to have been a receipt ear-marked, as it were, for the purpose of reducing *Vulliamy's* mortgage, and that *Vulliamy* should have taken notice of that receipt in his affidavit. On the other hand, it might have

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been argued that *Ward*, having legitimately become owner of the first and second mortgages, and having an undisputed subsequent equitable charge, had the right to tack his third charge to his first and second, and to hold everything which the first and second gave him for the purpose of procuring payment, as far as he could, also of his third charge, and that if this receipt of rents was originally destined for the security of payment of Mr. *Vulliamy*, Mr. *Ward* by becoming the transferee of *Vulliamy* became also the transferee of the right to receive the rents, and that as *Patch* could have taken nothing away from *Ward* without satisfying fully every part of every security which *Ward* held, *Ward* would be justified in applying the rents subsequently received in discharge, not of the first or second mortgage, but of the third. It is not necessary to consider which of those two views must have prevailed, because, in my opinion, *Ward* might fairly entertain the opinion that the view upon which he acted was the right and true view in point of law. I think it was an opinion that any person, whether a professional man or not, might fairly be supposed to entertain, and that it would be going far beyond any conclusion which the Court is authorized to draw from the facts, to say that a person who acted upon that opinion was influenced by any fraudulent motive or design towards the mortgagor. I therefore think that this, being the principal ground on which the bill was sought to be maintained, fails as did the first, and that the bill cannot succeed.

In what I have said I have taken no notice of the delay, but I think that no sufficient excuse has been offered for it, and this is a further reason why a bill of this kind cannot be maintained; but I think that, on the grounds I have already stated, the bill entirely fails.

The Vice-Chancellor, with whose judgment on the merits we entirely concur, dismissed this bill with costs. I have often had occasion to say that in my opinion, as a general rule, costs should follow the result. I think also that this rule should especially be adhered to where a suit which fails is founded upon a charge of fraud, or is brought after very great delay, and those observations might lead to the conclusion that this bill was rightly dismissed with costs. But there is a very great peculiarity with regard to this suit. I have said that I do not think Mr. *Ward* was bound

to state to the Court and to put upon record the change of interest which had taken place. The result, however, of his not doing so was necessarily this, that to Mr. *Patch*, or to his solicitor, or to any person else, these proceedings, upon the face of them, would only convey the information that the incumbrances on this property were owned by the first mortgagees, *Leaf* and others, and by *Vulliamy*. They would also convey the information that *Vulliamy* deposed in the way I have read, before the order absolute, to the whole amount of the £6870 9*s*. being due to him. Then, on further inquiry, supposing *Patch*, or any one on his behalf, subsequently to inquire into the transaction, it would appear that rents were received in the interval, which I have already referred to, by *Ward*, or by his clerk Mr. *Stemp*. It would appear difficult to reconcile the receipt of those rents, and the non-accounting for them, with the position of *Vulliamy* as the person entitled to the mortgage upon the record, and the person exercising the right of redemption. These facts are explained upon the answer of *Ward*, and upon the evidence. I have given *Ward* the full benefit of his explanation, and have held that that explanation absolves him from the charge of fraud. But I think it was absolutely necessary that such explanation should be given before either the Court or any other person could arrive at the conclusion that fraud was not to be imputed to *Ward* in the management of these proceedings, and I doubt whether such explanation could have been satisfactorily given except through the medium of this investigation. I therefore think that there is reason for departing in this case from the general rule with regard to costs, and that the bill ought to have been dismissed without costs, and that there ought to be no costs of the appeal.

SIR JOHN ROLT, L.J.:—

The Plaintiff in this case seeks for relief against an order of March, 1849, making the decree for foreclosure in the cause absolute. He has not obtained, and is not seeking for, leave to file a bill of review in the suit in which the order absolute was made, and, indeed, he is wisely taking the course he has taken, for it is reasonably clear that he could not have obtained any such order.

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The bill for foreclosure was filed in May, 1847; *Patch*, the present Plaintiff, put in his answer in the month of July in that year. His solicitor acted for him, I think, for several months while he was in this country. Then his own affairs induced him to leave this country. He is aware that a suit is instituted. He knows, and must be taken to know, the course that that suit will take. It is a foreclosure suit for foreclosing the mortgage upon eleven houses, the particulars of which are well known to him. He does not discharge his solicitor. His solicitor remains in this country. He must therefore be taken to have known, and be charged with knowledge, of all that took place in the suit, and I think it would be very difficult, if not impossible, for him to say that anything which was done in the course of the suit was not within his knowledge.

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That being so, I think it useful to refer to the distinction in practice between asking for an enlargement of time for redeeming a mortgage before the day arrives, and asking to open a foreclosure after the order for foreclosure has been made absolute. I asked the counsel for the Appellants several times for authority to shew upon what principle the Court would open a foreclosure after the order for making it absolute had been made, but none were cited. I did not doubt that such cases exist, but I think it will be found that there is a clear distinction between the two classes of cases,—that slight circumstances will induce the Court to enlarge the time before the day arrives, but that after the order for foreclosure has been made absolute, it must be shewn that the person who seeks to set it aside or to have it disregarded fully intended and was prepared to pay the money on the day, but was estopped by some accident from complying with the exigencies of the order. On shewing that he obtains the order that notwithstanding the order absolute he may be at liberty to redeem within a given time. There being in the present case no such ground for coming here to review the order absolute, the Plaintiff can come to be relieved from it only on the ground of it having been obtained by fraud. I think, for the reasons which have been given by my learned brother, that the fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case, and obtaining that

decree by that contrivance. Mere constructive fraud not originating in actual contrivance, but consisting of acts tending possibly to deceive or mislead without any such intention or contrivance, would probably not be sufficient—at all events I think could not, after such delay as has occurred in this case, be deemed sufficient —to set aside the order which has been made. What, therefore, the Appellant has to do is to satisfy the Court that the decree was obtained by the positive and actual fraud and contrivance of the party obtaining it. [His Lordship then dealt with the other branch of the case not noticed in this report.]

Then comes the more important circumstance of the affidavit made by Mr. *Vulliamy* immediately before the order of foreclosure was made absolute. Now, I must say that I think the making by *Vulliamy* of the affidavit which he did make, was, under the circumstances which then existed, irregular, and cannot be sanctioned by the Court as conformable to the proper practice. *Vulliamy* had, in the previous December, transferred his mortgage to *Ward*. The question was, whether any rents had been received between December and March. *Vulliamy* had no interest in that question, having received in December everything that was due to him. He comes in the following March, and makes an affidavit that he has received nothing since December. I think the affidavit, if he made an affidavit, should have disclosed the fact that he had transferred his interest in the previous December, though the transferee had not become a party to the suit. Still the irregularity is not necessarily a fraudulent one, and unless something has grown out of it such as to affect the parties with fraud, it will not be enough to impeach the order absolute. It therefore becomes necessary to look at the affidavit of *Vulliamy* as if it had been made by *Ward*. I think it would not have been regular for *Ward* to have made the affidavit in those terms. He should have disclosed that he had an equitable mortgage subsequent to *Vulliamy's* mortgage which he had paid off, that he had received some rents in the month of December, and that he had applied them and claimed to apply them in discharge of that equitable mortgage.

I agree with my learned brother that it is not necessary, for the reasons he stated, to enter into the question whether *Ward* was

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right or wrong in so applying the rents, which appears a nice and doubtful question. What the Appellant has to do is to satisfy the Court that there was *mala mens*, that *Ward* resorted to this contrivance in order to conceal the receipt of £100 from the Court, and to get a decree for redemption or foreclosure from the Court for a debt of £6870, instead of a debt of £6709. It appears to me of great importance to consider what possible motive *Ward* could have had to resort to any such contrivance for that purpose. If he had stated all the facts to the Court, the Court might have held that he had a right to apply the rents as he did, in which case the receipt of them would have been of no consequence; but if the Court had held him to have no such right, the only result would have been that he would have been charged with those sums in respect of *Vulliamy's* debt, and a further time of three months would have been given for redemption. I think it impossible to hold in a case where relief is asked against the decree more than twelve years after it was made, that circumstances such as those relied on here are sufficient to prove *Ward* guilty of an actual and positive fraud.

On these grounds, I think that the decree made so long ago must stand, and that for the reasons given by my learned brother the bill should be dismissed without costs, and no costs given of the appeal.

Solicitor for the Plaintiff: Mr. *E. Woodard.*
Solicitor for the Defendant: Mr. *H. Ward.*

In re SUGGITT'S TRUSTS.

L. JJ.
1868
Feb. 21.

Wife's Equity to a Settlement—Form of Settlement—Amount to be settled—Misconduct of Husband.

The Court will not settle the whole of a wife's fund upon her and her children unless the husband is insolvent, or has been guilty of gross misconduct, such as adultery, cruelty, or desertion. In determining the proportion of the fund to be settled, the Court is bound by no fixed rule, but will exercise a judicial discretion according to the circumstances of the case.

The Court will not interfere with the husband's ultimate right to the settled fund in default of children in case of his surviving his wife.

The order of the Master of the Rolls varied.

THIS was an appeal from an order of the Master of the Rolls made on the Petition of *Mary Chapman*, the wife of the Respondent *C. F. A. Chapman*, for the settlement of a fund paid into Court under the *Trustee Relief Act*.

The Petitioner was at the time of her marriage entitled to a share of the residuary estate under the will of *John Suggitt*. This share, amounting to £575 7*s*. 7*d*., was, in June, 1867, paid into Court under the *Trustee Relief Act* by *William Holder*, the surviving trustee, and had since been invested in Old East Indian Stock.

The Petitioner and her husband were married on the 8th of May, 1865, at *Pickering*, in *Yorkshire*, and no settlement was made either before or subsequently to the marriage. There was no issue of the marriage.

The Petitioner stated that on the very day of the marriage her husband struck and abused her, and she also accused him of habitual intemperance, but they continued to live together at *Pickering* and *Scarborough*, with occasional absence on the part of the husband, till the beginning of July, 1865, when he went to *London* for the purpose of seeking for employment. At the time when they married the Respondent was a bookkeeper in the employ of a tradesman at a salary of £1 a week, and he had subsequently obtained employment as a shopman. The Respondent denied that he had struck his wife, and stated that he had frequently urged her to return to him and offered her a home, but he had contri-

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buted little or nothing to her support since he left her, and she had been supported by her earnings as a housemaid and by the bounty of her friends.

Under these circumstances the Master of the Rolls ordered the whole of the fund to be settled in trust for the wife for life, for her separate use, with remainder for her children equally, and in default of children, in case the wife should survive her husband, upon trust for her personal representatives, but if she should die in his lifetime in trust for such persons as she should by will appoint, and in default of such appointment in trust for the husband absolutely. From this order *C. F. A. Chapman* appealed.

Mr. *Fry*, for the Appellant:—

We complain of the order on two grounds. First, because a general power of appointment over the fund is given to Mrs. *Chapman* in default of issue if she dies in the lifetime of her husband; and, secondly, because the whole fund has been settled.

As to the first point: the jurisdiction exercised by the Court arises out of the equity of the wife and children, and when that is satisfied there is nothing to displace the right of the husband. It has, therefore, never been the practice of the Court to give the wife a disposing power over the fund in default of children: *Carter* v. *Taggart* (1); *Spirett* v. *Willows* (2); *Bagshaw* v. *Winter* (3).

As to the second point: the old rule of the Court was to settle half the fund: *Beresford* v. *Hobson* (4); *Napier* v. *Napier* (5). In later times there has been more discretion exercised by the Court, but the whole fund is never settled except in two cases; first, where the husband is insolvent or has deserted his wife, so that he is unable or refuses to maintain her; and, secondly, where the husband has already received part of the fund. Of the first class are *Brett* v. *Greenwell* (6); *Gardner* v. *Marshall* (7); *Gilchrist* v. *Cator* (8); *In re Cutler* (9); *Francis* v. *Brooking* (10); *In re Kincaid's Trusts* (11). Of the second class are *Scott* v. *Spashett* (12):

(1) 5 De G. & Sm. 49.
(2) Law Rep. 1 Ch. 520.
(3) 5 De G. & Sm. 466.
(4) 1 Madd. 362.
(5) 1 D. & War. 407.
(6) 3 Y. & C. Ex. 230.
(7) 14 Sim. 575.
(8) 1 De G. & Sm. 188.
(9) 14 Beav. 220.
(10) 19 Ibid. 347.
(11) 1 Drew. 326.
(12) 3 Mac. & G. 599.

Ward v. *Yates* (1). In *Dunkley* v. *Dunkley* (2) the husband had deserted his wife and had been guilty of adultery, and there had been a divorce *à mensâ et thoro.*

In the present case there are none of these special circumstances. The husband is able and willing to support his wife in their own condition of life, but she refuses to return to him. The allegation of his striking her is contradicted, and whether true or not it has been condoned.

Mr. *Baggallay*, Q.C., and Mr. *Bury*, for the Respondent:—

The rule that the husband ought to have half, which is approved of in *Napier* v. *Napier* (3), has long been dissented from, and it is now in the discretion of the Court whether he shall have any, and what part of the fund. In *Spirett* v. *Willows* (4) the Court settled three-fourths; in *Carter* v. *Taggart* (5) two-thirds. It is true that the insolvency of the husband is a usual ground for depriving the husband, because the question seldom comes before the Court except where there is insolvency; but it is not the only ground. If the husband does not actually support his wife it is sufficient; in all the cases relied on by the other side the parties were living together. Here, the husband is not living with his wife, and has not contributed to her support for more than two years. If he were living with her we should not object to the limitation being to him absolutely in default of children; but even then the smallness of the fund would render it inexpedient to divide it. *Re Hooper's Trusts* (6) is an authority in our favour.

Mr. *Fry*, in reply.

LORD CAIRNS, L.J.:—

There is no doubt that the rule of the Court with respect to cases of this kind was in former times supposed to be, that the fund should be equally divided between the wife and children on the one hand, and the husband on the other. It is equally clear that in modern times that rule has been considerably relaxed, and that, as regards the shares in which the fund should be divided,

(1) 1 Dr. & Sm. 80.
(2) 2 D. M. & G. 390.
(3) 1 D. & War. 407.
(4) Law Rep. 1 Ch. 520, 12 Jur. (N.S.) 588
(5) 5 De G. & Sm. 49.
(6) 6 W. R. 824.

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considerable latitude has been assumed by the Court; not such latitude, indeed, as to allow the Court, as was suggested in argument, to do what it likes in the division of the fund, but so as to admit of the discretion of the Court being exercised in each individual case. If, therefore, the question in this case had simply been as to the relative apportionment of the fund between the wife and children on the one hand and the husband on the other, I should have hesitated to interfere with the discretion of so learned and experienced a Judge as the Master of the Rolls; but when it is proposed to go beyond an apportionment, and to make a settlement of the whole fund upon the wife and children to the exclusion of the husband's marital right, it is necessary to shew that some of those special elements exist which have induced the Court so to deal with a fund.

In the present case I am not satisfied that any such elements are to be found. There is no proof of any desertion in the sense in which the word ought to be used; there has been no adultery, and no allegation of cruelty, except of one isolated act, stated in the wife's affidavit, which, if it ever occurred, has been condoned. Nor is there insolvency on the part of the husband, or inability to support his wife; and if the smallness of the fund were in any case sufficient of itself to justify the settlement of the whole, there is not such smallness here, considering the position in life of the parties. In my opinion, therefore, there is no ground for settling the whole fund.

Then with respect to the form of the settlement, the principle on which the Court acts is to let in the equity of the wife and children, and to that extent to exclude the husband's marital right. But as soon as that equity is satisfied the provisions of the settlement ought to end, and the marital right ought to return.

Applying these principles to the present case, I think the justice of the case will be met, if after paying the costs of all parties out of the fund, so much of the investment as will amount in value to £300 sterling, be settled on the wife and children, and the rest —which, I suppose, will amount in value to about £150 sterling, or one-third of the whole—be given to the husband. The trusts of the settlement will be for the wife for life for her separate use, and then for the children of the marriage in the usual way, and in

default of children for the wife absolutely if she survive her husband, and if not, then to the husband absolutely.

SIR C. J. SELWYN, L.J. :—

The Court has always exercised a wide discretion in these cases. In *Guy* v. *Pearkes* (1) where the wife had been deserted by her husband, Lord *Eldon* ordered a portion of the capital of the fund in Court to be applied for the past maintenance of the wife, and said: "I have a strong impression on my mind that this has been done; and, independent of precedent, I think the Court may do it, as the husband deserting his wife leaves her credit for necessaries, and would be liable to an action; and though execution could not be had against the stock, the effect might be obtained circuitously, as he could not relieve himself except by giving his consent to the application of this fund."

In every case of this nature the Court is called upon to consider the special circumstances, and we have now before us two fresh affidavits, which were not before the Master of the Rolls. But the evidence is still so vague and unsatisfactory, and the allegations so general, that if the fund had been larger I should have been unwilling to decide the question without further investigation; but as it is small, and so much has already been consumed in costs, and as neither party desires to add to the evidence, I feel compelled to decide it on the present materials, and I think that the order proposed by my learned brother will meet the justice of the case.

Solicitors for the Appellant: Messrs. *Sharp & Ullithorne.*
Solicitor for the Respondent: Mr. *Lammin.*

(1) 18 Ves. 196.

L. J. C.
1868
Jan. 24, 30;
Feb. 7.

PROLE *v.* SOADY.

Husband and Wife—Wife's Chose in Action—Reduction into Possession—Pre-nuptial Contract—Divorce—Practice—Withdrawing Affidavit.

A woman being entitled to a fund in Court, applied shortly before her marriage for a loan on the security of the fund. Before the transaction was completed she married, and the money was then advanced to her husband, who joined with his wife in assigning the fund by way of mortgage. The fund was then carried over to the joint account of the husband and wife, and a stop order put upon it in favour of the mortgagee. In June, 1867, a decree *nisi* for dissolution of marriage was pronounced by the Divorce Court, which became absolute in January, 1868. In the interval the mortgagee presented a Petition, on which an order was made by *Stuart*, V.C., in November, 1867, for payment of his debt out of the fund in Court:—

Held, first, that the mortgage by the husband and wife did not bind the wife's right by survivorship, and that the pre-nuptial negotiation by the wife made no difference:

Secondly, that the carrying over the fund to the account of the husband and wife was not a reduction into possession by the husband:

Thirdly, that on the decree for dissolution of marriage becoming absolute, it took effect from the date of the decree *nisi*, and consequently the order made in the interval on the Petition was of no avail to reduce the fund into possession.

The order of *Stuart*, V.C., reversed.

After an affidavit has been read at the hearing of a matter, it cannot be withdrawn without the consent of the other party.

THIS was an appeal from an order of Vice-Chancellor *Stuart* ~~dismissing~~ the Petition of *W. H. Warren* for the payment of a sum of £500 to the Petitioner out of a fund in Court standing to the credit of the above cause.

Previously to the marriage of *Charlotte Jeyes*, formerly *Charlotte Prole*, with her husband, *Francis Montague Jeyes*, Mrs. *Jeyes* was absolutely entitled to a share in a sum of £13,196 7*s.* 5*d.* consols, standing to the credit of this suit to "The Common Fund Account."

In the month of July, 1866, shortly before her marriage, Mrs. *Jeyes* applied to the Petitioner to lend her the sum of £500. The negotiation was conducted through the medium of Captain *Byrne*, a friend of Mrs. *Jeyes*, who stated in his affidavit that Mrs. *Jeyes* had distinctly authorized him to offer her interest in the fund in Court as a security for the advance. Mrs. *Jeyes*, on the other hand,

denied that she had offered any security but her promissory note. The Petitioner's solicitor being informed by Captain *Byrne* of the nature of Mrs. *Jeyes'* interest, prepared a mortgage of her share of the fund in Court, which was engrossed ready for execution; but, two days before the day appointed for execution, Mrs. *Jeyes* married. She, however, informed the Petitioner's solicitor that her husband was willing to complete the transaction, and accordingly a fresh mortgage was prepared, and executed by Mr. and Mrs. *Jeyes* on the 14th of August, 1866. By this deed *F. M. Jeyes* and *Charlotte* his wife, in consideration of £500 advanced to them by the Petitioner, assigned to the Petitioner all the share and interest of *Charlotte Jeyes* in the said sum of £13,196 7*s.* 5*d.*, and in all other sums of money to which she might be entitled in the suit of *Prole* v. *Soady*, for securing the debt and interest.

The sum of £500 was paid to *F. M. Jeyes*, and expended by him, and no part of it was received by Mrs. *Jeyes*.

By an order made in the suit on the 19th of March, 1867, it was ordered that the share of Mrs. *Jeyes* should be carried over to an account to be entitled "The Account of *F. M. Jeyes* and *Charlotte* his wife," and that no part of the bank annuities or cash so carried over, or any dividends to accrue thereon, should be transferred, sold, or paid out without notice to the Petitioner. The share was accordingly carried over, and at the time of the filing of the Petition consisted of £3276 5*s.* 7*d.* consols and a sum of cash.

Shortly afterwards a suit for divorce was instituted by Mrs. *Jeyes* against her husband, and by the decree of the Divorce Court, dated the 27th of June, 1867, it was ordered that the marriage between them should be dissolved, unless cause was shewn to the contrary within six months.

The Petition prayed for the payment to the Petitioner of the sum of £500 and interest out of the fund standing in the joint names of the husband and wife, and the Vice-Chancellor, by an order dated the 15th of November, 1867, granted the prayer of the Petitioner.

On the 14th of January, 1868, the decree for dissolution of marriage was made absolute.

Mrs. *Jeyes* appealed from the decision of the Vice-Chancellor, and the appeal came on before the Lord Justice Lord *Cairns* on

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the 17th of January, 1868, when the counsel for the Appellant read a further affidavit which had been filed on the 19th of December. The counsel for the Respondent offered to read affidavits in reply, which had been filed on that morning. The counsel for the Appellant thereupon said that he would withdraw the affidavit which had been filed by the Appellant, so that none of the fresh evidence might be read.

The LORD JUSTICE CAIRNS said that the affidavit, having been read, could not now be withdrawn without the consent of the other party, but the case might stand over in order that the Appellant might have the opportunity of considering the affidavits in reply.

Feb. 7. Mr. *Greene*, Q.C., and Mr. *Bevir*, for the Appellant:—

It is now well settled that the assignment or mortgage by a husband of his wife's *chose in action* will not defeat her right by survivorship, unless the husband or his assignee do some act to reduce the property into possession: *Hutchings* v. *Smith* (1); *Ellison* v. *Elwin* (2); *Michelmore* v. *Mudge* (3); *Ashby* v. *Ashby* (4). The Vice-Chancellor was of opinion that there was a pre-nuptial contract by Mrs. *Jeyes*, which supported the subsequent transaction. It is true that evidence of what took place is conflicting, but it is clear that there was no concluded contract, but only a negotiation before the marriage of Mrs. *Jeyes* to mortgage the fund; and further that, if there was a contract, it was in consideration of a loan to herself, and not to her husband. The effect of the divorce is, that the wife is placed in the same position as to her *choses in action* as if her husband were dead: *Wells* v. *Malbon* (5); *In re Insole* (6).

Mr. *De Gex*, Q.C., and Mr. *Shebbeare*, for the Respondent:—

The husband is bound by his wife's contract made before the marriage. In the present case the contract was made on the eve

(1) 9 Sim. 137.
(2) 13 Ibid. 309.
(3) 2 Giff. 183.
(4) 1 Coll. 549.
(5) 31 Beav. 48.
(6) Law Rep. 1 Eq. 470.

of the marriage, and Mrs. *Jeyes*, before her marriage, knew that the money would be paid to her husband, and consented to it.

But we also contend that the fund was reduced into possession by the husband. First, it was reduced into possession by being separated from the fund standing to the general credit of the cause and carried to the separate account of the husband and wife. Secondly, it was reduced into possession to the extent of the mortgage debt by the order which is now appealed from. That order was made on the 15th of November, 1867, and the decree for dissolution of marriage did not become absolute till the order made in Hilary Term, 1868. In the interval between the order *nisi* and the decree becoming absolute there was a *locus pœnitentiæ*, and the husband still retained his marital rights. Under the first *Divorce Act* (20 & 21 Vict. c. 85, s. 57), when a decree was made absolute in the first instance subject to an appeal within a limited time, if a woman married again before the time limited for appeal, the second marriage was void: *Chichester* v. *Mure* (1). The same principle would apply still more strongly to the present practice.

Mr. *Greene*, in reply:—

The decree for divorce becomes absolute at the expiration of the time limited, without any fresh order, and it dates from the order *nisi* (23 & 24 Vict. c. 144, s. 7).

LORD CAIRNS, L.J.:—

There has been no dispute—indeed, after the authorities there could be no dispute—as to the principles of this Court in dealing with a fund of this nature belonging to a married woman. At the time of the marriage, and when the deed was executed, Mrs. *Jeyes* was absolutely entitled to a share in a fund in Court standing to the credit of the cause of *Prole* v. *Soady*. Under these circumstances, by the settled law of the Court, the security would be void against her right by survivorship unless something were done by the husband or his incumbrancer to reduce the fund into possession.

But it was said that in the present case there were special circumstances which took it out of the general rule. First, it was

(1) 3 Sw. & Tr. 223.

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said that there was a contract before marriage which gave effect to the security executed after marriage. It is not necessary for me to go into the question of the effect of the negotiations before the marriage; because I am willing, for the purpose of the argument, to put it in the way most favourable to the incumbrancer. But in the most favourable view it amounts to this—that there was nothing concluded between the parties which could have been treated as a final agreement between them. Mrs. *Jeyes* only said, "I am the owner of a fund in Court: I am in want of a loan as a *feme sole*, and as a *feme sole* I will give a security on that fund." Then came the marriage; and it became of course impossible to pay money to Mrs. *Jeyes* as a *feme sole* or for her to give security as a *feme sole*. Therefore it became necessary for a new contract to be made. The deed mentions the fund, and recites that the husband and wife had requested the Petitioner to advance the money to the husband and wife, and that they had agreed to secure it by mortgage of the fund. The only contract mentioned is the contract for the mortgage which was given by the deed. If that mortgage is good, the Petitioner has the benefit of it; if not, he has all that he bargained for.

It was argued that it is a dishonest and unjust thing that the lady should be allowed to assert her right of survivorship under such circumstances. But the law throws restraints upon married women against the enjoyment of their property, and, on the other hand, enables them to bind their property by alienation in certain specified methods. If these methods are not resorted to, it is at the peril of those who act without resorting to them. The Court cannot entertain the question of justice or injustice in such a case. It is, therefore, my opinion that there was in this case no contract which can be enforced against Mrs. *Jeyes*' right of survivorship.

It was, however, contended by the counsel for the Petitioner that there had been in this case a reduction into possession; and they endeavoured to shew this in two ways. First, it was said that the carrying over the fund to the joint account of the husband and wife was a reduction into possession on the part of the husband. My decided opinion is that it had no such effect, and that its effect was simply to leave the money subject to any rights which the husband and wife might have over it. It did not in any way affect the possession of the fund. Secondly, it was said that the decree

nisi for the dissolution of the marriage having been made on the 27th of June, 1867, and the rule absolute not being made till the 14th of January, 1868, the parties had in the interval a *locus pœnitentiæ*, and that the incumbrancer availed himself of this interval to obtain the order now appealed from, which was a reduction into possession to the extent of his incumbrance. I am of opinion that, according to the Act, it is impossible to hold otherwise than that the order *nisi* is the decree which the Court eventually makes absolute against the parties. Therefore I think the order absolute in this case took effect from the date of the order *nisi*, namely, from the 27th of June, 1867, and that everything done in the interval was subject to the danger of being set aside by the order becoming absolute.

I am of opinion that the proper order in this Petition would have been to dismiss the Petition with costs, and the order of the Vice-Chancellor must, therefore, be reversed.

Solicitor for the Appellant: Mr. *R. H. Peacock.*
Solicitor for the Respondent: Mr. *T. A. Jones.*

ISAACSON *v.* HARWOOD
BROOK *v.* HARWOOD.

Breach of Trust—Specialty Debt—Acknowledgment by Deed under Seal.

A defaulting trustee, under a will, executed a deed under seal, whereby, after reciting that he held in his hands trust moneys to a certain amount, which he proposed to secure by a mortgage on his own estate, he conveyed certain property to the *cestuis que trust* by way of mortgage. The deed contained a proviso for redemption and a power of sale, but no covenant to pay the mortgage debt or interest. The mortgaged estate was insufficient to cover the debt:—

Held (reversing the decision of *Stuart*, V.C.), that the deed did not convert the debt into a specialty debt.

THIS was an appeal from an order of Vice-Chancellor *Stuart*, by which he decided that the Plaintiff *Mary Brook* was a specialty creditor of *Charles Harwood*, whose estate was being administered in the cause, for a sum of £1582 17*s.* 11*d.*, with interest. (a)

(a) See 3 & 4 W. 4.

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Charles Harwood, the late husband of the Defendant, was a trustee under the will of *R. G. Blick*, and was a defaulter to a considerable extent in respect of moneys which he had received for the sale of the testator's real estate.

By an indenture, dated the 25th of March, 1852, made between *Charles Harwood* of the one part, and *Elizabeth Blick*, the testator's widow, and the Plaintiff *Mary Brook*, who were interested under the will, of the other part, and duly executed under his hand and seal, it was recited that *Charles Harwood* was entitled to certain reversionary property, and "that the said *Charles Harwood* had in his hands the sum of £1582 17*s.* 11*d.*, being the amount of the purchase-money for some property sold under the trusts of the will of the testator, and which sum the said *Charles Harwood* had proposed to secure by a charge upon his said reversionary estate and interest in manner thereinafter mentioned." The indenture then witnessed that in consideration of the above sum then in the hands of *Charles Harwood*, which he thereby admitted to have received as purchase-money for property sold under the will of the said testator, he granted unto *Elizabeth Blick* and *Mary Brook*, and their heirs, certain reversionary interests as in the deed mentioned, to hold the same subject to the proviso for redemption thereinafter contained. The deed contained a proviso for redemption, and a power of sale in case of default, and covenants for title and for further assurance, but it did not contain any covenant on the part of *C. Harwood* for payment of the principal money or interest. *C. Harwood* paid £110 a year to Mrs. *Blick* during her life, in respect of the interest on the amount that had been ascertained to be due from him. He died in 1866, and the Defendant was his administratrix. The property contained in the mortgage deed was not sufficient to satisfy the debt.

These suits were instituted for the administration of *C. Harwood's* estate, and in the second suit a declaration was prayed that the sums received by him as trustee, with interest, constituted a specialty debt due from his estate, and that so much of the debt as the mortgage security of March, 1852, would not extend to satisfy might be provided for accordingly.

In taking the accounts the Chief Clerk had disallowed the claim

as a specialty debt, and the case came on as an adjourned summons before the Vice-Chancellor.

His Honour was of opinion that the effect of the deed of the 25th of March, 1852, was to constitute the debt a specialty debt, and made an order accordingly. From this decision the Plaintiff *Isaacson*, who was a specialty creditor, appealed.

Mr. *Karslake*, Q.C., and Mr. *Ince*, for the Appellant:—

Money due under a breach of trust is a simple contract debt unless there has been a covenant, express or implied, to pay it. There was nothing in the deed of 1852 to alter the character of the debt; there was no covenant to pay the debt, or to hold it upon the trusts of the will; there was merely a recital that it was due. Whether such a recital amounts to a covenant depends upon the intention of the parties. The object of this deed was not to bind *Harwood* by covenant but to secure the debt on his reversionary property: *Courtney* v. *Taylor* (1); *Adey* v. *Arnold* (2); *Marryat* v. *Marryat* (3); *Wynch* v. *Grant* (4); *Saunders* v. *Milsome* (5); *Yates* v. *Aston* (6).

Mr. *Greene*, Q.C., and Mr. *G. N. Colt*, for *Mary Brook*:—

We do not dispute the principle stated in *Courtney* v. *Taylor* and *Adey* v. *Arnold*, but we say that there was an intention in this case to make the debt a specialty debt. It was acknowledged as a debt by a deed under seal, and that in itself is a covenant: it is true there is no covenant to pay, but the proviso for redemption puts the intention of the parties beyond a doubt: *Gifford* v. *Manley* (7); *Turner* v. *Wardle* (8); *Cummins* v. *Cummins* (9); *Richardson* v. *Jenkins* (10); *Wood* v. *Hardisty* (11).

LORD CAIRNS, L.J.:—

The question in this case is one which has frequently been

(1) 7 Scott, N. R. 749; 6 Man. & G. 851.
(2) 2 D. M. & G. 432.
(3) 28 Beav. 224.
(4) 2 Drew. 312.
(5) Law Rep. 2 Eq. 573.
(6) 4 Q. B. 182.
(7) 3 Cas. t. Tal. 3rd Ed. p. 109.
(8) 7 Sim. 80.
(9) 3 J. & Lat. 64.
(10) 1 Drew. 477.
(11) 2 Coll. 542.

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discussed before various Courts of law and equity, and on which I think there can be no doubt.

In every case it is a question of the construction of the instrument,—what did the parties intend? Was it intended that the trustee should give a covenant for payment of the money? There is no different rule in this respect in law and in equity.

Now it is well settled that there is no magic in the words of a covenant. Whatever words are used by a party to a deed, if he intends that they shall operate as a covenant, he will be held liable. In the simple case of a debtor acknowledging a debt by a deed under seal, without any other object declared by the deed, no doubt it must be assumed that, although no words of covenant are used, the debtor meant to be bound, or else why should he go through the form of executing a deed? But is the present a case of a party acknowledging a debt by deed under seal, with no other object but to acknowledge the debt? It is plain that he had another object. There was a clear antecedent liability in *Harwood*, arising out of his breach of trust. There was therefore no necessity for any acknowledgment, and, if the desire of the parties was to fix on him a specialty obligation, they would have used unambiguous words for that purpose. I cannot doubt that the sole object of the deed was to give security for the debt, and all the recitals appear to me, not to be by way of covenant for payment of the debt, but a simple narrative leading up to the security, and to the form in which the security should be given. In addition to this there is a conspicuous absence of an express covenant to pay the mortgage debt. Mr. *Greene* argued that in the absence of such a covenant, the proviso for redemption amounted to a covenant to pay the debt. I cannot adopt that argument; I know of no authority for such a contention. On the whole, therefore, the construction of the deed leads me to the conclusion, that it was not intended to make the liability under the breach of trust a specialty debt: and finding that the principle upon which I have proceeded is distinctly adopted in *Courtney* v. *Taylor* (1) and *Adey* v. *Arnold* (2), I am bound to hold that Mrs. *Brook* is not a specialty creditor, but a simple contract creditor of the estate. The application before the Vice-Chancellor ought, therefore, to

(1) 7 Scott, N. R. 749; 6 Man. & G. 851. (2) 2 D. M. & G. 432.

have been dismissed with costs; but there will be no costs of the appeal.

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Solicitors for the Appellant: Messrs. *Talbot & Tasker*, agents for Messrs *Brockman & Harrison, Folkstone.*

Solicitors for Mrs. *Brook*: Messrs *Brace & Leathes.*

In re WOODCOCK'S TRUSTS.

L. JJ.
1868
Feb. 21; *March* 13.

Practice—Leases and Sales of Settled Estates Act—Lunatic.

The committee of a lunatic must obtain the permission of the Court of Lunacy before he consents to an application to the Court of Chancery under the *Leases and Sales of Settled Estates Act.*

THIS was a Petition under the *Leases and Sales of Settled Estates Act* (19 & 20 Vict. c. 120), for the sale of certain estates comprised in the marriage settlement and will of *Michael Woodcock.* The Petitioner was *Edward Peacock*, in his own right, and as the committee of the person and estate of *Ann Woodcock*, the tenant in tail of a moiety of the estates, who had been found lunatic by inquisition; the Petitioner and the lunatic being the only persons whose consent was necessary to the sale.

On the Petition being brought on before Vice-Chancellor *Wood*, His Honour suggested that the consent of the committee on behalf of the lunatic could not be given without the permission of the jurisdiction in Lunacy, and desired that the case might be mentioned to the Lords Justices. This was accordingly done.

Mr. *Whitehead* appeared for the Petitioner:—

The 36th section of the *Leases and Sales of Settled Estates Act* provides that all applications and consents under the Act may be made by committees on behalf of lunatics, provided that in the case of lunatic tenants in tail no application or consent may be made or given without the special direction of the Court of Chancery. By the Cons. Ord. XLI., Rule 23, and the Regulation of the 8th of August, 1857, Rule 22, a summons is to be taken out by the committee in the Judge's Chambers, for leave to apply or

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consent on behalf of the lunatic, after the Petition has been presented to the Court of Chancery in the ordinary way. There is no mention, either in the Act or in the General Orders, of any application to the jurisdiction in Lunacy.

Lord Cairns, L.J.:—

I do not say that, as against a purchaser, an order made without the consent of the jurisdiction in Lunacy would be invalid; but, as a general rule, the jurisdiction in Lunacy does not allow anything to be done with the property of a lunatic without its permission. We think that the committee must apply to the jurisdiction in Lunacy for leave to present the Petition.

Sir C. J. Selwyn, L.J.:—

There was never any doubt that the application was made in correct form to the Vice-Chancellor; but the question was, what was necessary as a preliminary to the application? The committee must shew to the Vice-Chancellor that he has the authority of the jurisdiction in Lunacy to make the application.

March 13. Mr. *Whitehead* again mentioned the case to the Lords Justices (Sir *W. P. Wood* and Sir *C. J. Selwyn*) and said that the Master in Lunacy was satisfied of the propriety of the application by the committee, but desired the direction of the Court as to the form in which the consent of the jurisdiction in Lunacy should be obtained in this and similar cases.

Sir C. J. Selwyn, L.J.:—

It will not be necessary for the matter to be brought into Court or for any advertisements to be issued, or any of the other forms complied with which are required in the application to the Court of Chancery. The committee will only have to go before the Master in Lunacy, who, if he approves of the application, will make a special report to the Lords Justices; and their indorsement will be the authority to the committee to consent to the application to the Court of Chancery.

Solicitors: Messrs. *Ridsdale & Craddock.*

LONDON, CHATHAM, AND DOVER RAILWAY COMPANY *v.* IMPERIAL MERCANTILE CREDIT ASSOCIATION.

L. JJ. 1867 Dec. 5.

Practice—Advancing Appeal from Order on Demurrer.

An appeal from an order overruling a demurrer will generally be advanced, if the right to an injunction is involved, but there is no rule that it should be advanced in other cases.

IN this case the *General Credit Company*, one of the Defendants, had demurred to the bill for multifariousness, and the demurrer had been overruled. The *General Credit Company* had appealed.

Mr. *Fry*, for the *General Credit Company*, now applied, with the consent of the Plaintiffs, to have the appeal advanced. He stated that the answer, if put in, must be of enormous length, and that if the appeal was not speedily disposed of great expense would be incurred, which, in the event of the appeal being successful, would be thrown away. He contended that the practice of having demurrers set down for speedy argument furnished an analogy in support of the application.

The LORD JUSTICE LORD CAIRNS asked whether the right to an injunction was involved.

Mr. *Fry* replied that no injunction had been applied for.

LORD CAIRNS, L.J.:—

It is almost a matter of course to advance an appeal from an order overruling a demurrer if the right to an injunction depends on the decision, but where the right to an injunction is not involved, there is no rule that it should be advanced. The original hearing of a demurrer is advanced because the pendency of a demurrer delays the proceedings in the cause, but no such argument is applicable to the present case. I think that no sufficient ground is shewn for our acceding to the application.

SIR JOHN ROLT, L.J., concurred.

Solicitors: Messrs. *Baxter, Rose, Norton, & Co.*

L. JJ.
1868
Feb. 14.

Ex parte PETRIE.
In re PETRIE.

Bankruptcy—Inspectorship Deed—Assent of Creditors—Date at which Creditors to be ascertained—Holders of negotiable Instruments.

A debtor executed an inspectorship deed by which it was provided that, in the case of debts due from him on negotiable instruments, either the original holder, or the present or ultimate holder, or any intermediate indorsers, might execute or assent to the deed, but that the ultimate holder should be deemed the creditor and party to the deed. The debtor was liable on acceptances on bills drawn by *S.*, who was returned as an assenting creditor in respect of them; but, in fact, *S.* was, at the time of the registration, the holder of only a small part of those bills, the rest being in the hands of his bankers, who had discounted them. After the registration all the bills came into the hands of *S.*:—

Held, that the bankers were the proper parties to have been returned as creditors in respect of the bills in their hands, and that *S.* had no right to assent in respect of his contingent liability as drawer; and, as striking out of these bills turned the scale of assents and dissents, the deed was void.

The bills having been given in respect of a speculation the result of which was not ascertained, it was held that *S.* could not be deemed a creditor in respect of his estimated loss in the transaction.

The registration, not the execution, of the deed is the period at which the relative position of the creditors is to be ascertained.

THIS was an appeal from an order made by Mr. Commissioner *Perry*, of the *Liverpool* Court of Bankruptcy, declaring that an inspectorship deed which had been executed by the Appellant, *James Petrie*, was invalid, and on that ground refusing to annul the adjudication of bankruptcy which had been made against him.

The Appellant, who was a canvas and sail-cloth manufacturer at *Liverpool*, on the 13th of December, 1867, executed a deed of inspectorship, the 14th clause of which was as follows:—"That in all cases where any person has received from the debtor negotiable instruments made, drawn, accepted, or indorsed by him, or on his behalf, which have been negotiated and are in the hands of third parties, either of such respective parties, namely, the original holders or recipients of such negotiable instruments, and the present or ultimate holders thereof, as well as any intermediate indorsers, may be admitted to execute, or assent to, or approve of,

the deed, without such act being an admission that they respectively are or will become creditors, but whichever of such necessary parties to each such negotiable instrument shall ultimately become the real holder thereof for value, shall be deemed and be the creditor, and as such the party to the deed in respect of such negotiable instrument; and in that case the execution, assent, or approval by the other or others of such parties in respect of such negotiable instrument shall be considered only as evidence of his, her, or their consent to such holder having or deriving the benefit of these presents in respect thereof, but without prejudice to his, her, or their execution, assent, or approval in respect of any other debt or claim; and until it shall be ascertained who will ultimately be the creditor in respect of such negotiable instrument all the persons who should have executed, assented, or approved in respect of such instrument shall be deemed to be one creditor only." This deed was registered on the 10th of January, 1868, but was now objected to on the ground that the requisite assents of creditors had not been obtained.

The amount of the Appellant's debts were £80,733 1*s.* 1*d.* Creditors to the amount of £64,178 9*s.* 4*d.* were stated at the time of registration to have assented, which would give about £3628 in excess of the requisite amount. It appeared, however, that at the date of the deed bills accepted by the Appellant were in the hands of Messrs. *Leyland & Bullins*, who were petitioning creditors in the bankruptcy, and dissented from the deed, to the amount of about £18,000. In the interval between the date of the deed and its registration some of these bills, to the amount of £12,000, were taken up by assenting creditors, and so included among the assents. The Commissioner was of opinion that the amount of these bills ought to be struck out of the assents, inasmuch as the assenting creditors were not creditors in respect of them at the date of the deed.

Among the liabilities of the Appellant were also bills to the amount of £9732, which had been drawn by Messrs. *Swire & Son*, and accepted by the Appellant. Messrs. *Swire & Son* were entered as assenting creditors to the whole of this amount; but in fact at the date of the deed bills to the amount of £710 only were in the hands of Messrs. *Swire & Son*, the remainder, amounting to £9022,

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being held by the *Union Bank of Liverpool* under discount. Before the registration of the deed part of those bills had been taken up, so that bills to the amount of £2080 were then in the hands of Messrs. *Swire & Son*, and the remainder of them came into their hands subsequent to the registration. These facts were admitted in a letter from *Petrie's* solicitors to the solicitors of the Respondents, dated the 28th of January, 1868. It also appeared that these bills had been drawn by Messrs. *Swire & Son* against shipments in which they had a joint interest with the Appellant.

The Commissioner was of opinion that the assent of Messrs. *Swire & Son* was sufficient as to all these bills, and overruled the objection to the deed on that account; but being of opinion that there was no valid assent as to the bills held by Messrs. *Leyland & Bullins*, he declared the deed to be invalid. From this decision *Petrie* appealed.

Mr. *De Gex*, Q.C., and Mr. *Yate Lee*, for the Appellant:—

The Commissioner was in our favour with respect to the bills drawn by *Swire & Son*. The only ground on which he decided that the deed was invalid was that the bills held by *Leyland & Pullins* were in the hands of dissenting creditors at the date of the deed. But it has been decided that the deed takes effect from registration, not from execution: *Stanger* v. *Miller* (1); *Ex parte Sullivan* (2). The same principle was recognised in *Ex parte Raistrick* [before Lord *Cairns*, L. J., Feb. 1868].

Mr. *Little*, Q.C., and Mr. *Bardswell*, for the petitioning creditors:—

The question in this case is not whether the assents were given in due time, but whether they were given by the right persons. The question raised by the Commissioner respecting the bills held by *Leyland & Bullins* is immaterial, because the assents in respect of the bills drawn by *Swire & Son* were not sufficient. The provisions of the 14th clause of the deed have been held, in *Wood* v. *De Mattos* (3), to be reasonable. Under that clause the holder for value at the time of the deed ought to give his assent, whoever

(1) Law Rep. 1 Ex. 58. (2) 36 L. J. (Bkcy.) 1.
(3) Law Rep. 1 Ex. 91.

might be the ultimate creditor. Where the debtor is the acceptor of a bill the holder, not the original drawer, is considered the creditor: *Griffith & Holmes'* Bankruptcy (1). In the present case the *Union Bank* were the holders for value of the bills, and it was deluding the other creditors to place *Swire & Son's* name as assenting for all the bills, when they were only holders of a small portion.

The only ground which *Swire & Son* could have for being considered creditors on the bills was in respect of the original consideration. But they were drawn against shipments in which *Swire & Son* and *Petrie* were jointly interested, and the loss upon the transaction was not yet ascertained. Their claim was in the nature of unliquidated damages for which they could not prove under this deed: *Ex parte Wilmot* (2).

Mr. *De Gex,* in reply:—

Messrs. *Swire & Son* as drawers of the bills were ultimately liable on them, and were therefore contingent creditors of *Petrie.* They might have proved or filed a claim in bankruptcy in respect of the liability under the 177th and 178th sections of the Bankruptcy Act, 1849, and they had therefore sufficient interest to support their assent to the deed: *Ex parte Patzker* (3); *Ex parte Magnus* (4); *Griffith & Holmes'* Bankruptcy (5). The *Union Bank* were merely formal holders for *Swire & Son,* who were their customers, and may be considered to have been their agents in the transaction. With respect to the consideration for the bills, the loss of *Petrie* and *Swire & Son* in the adventure had been estimated in an account between them.

LORD CAIRNS, L.J.:—

In this case I think there can be no doubt as to what both the justice of the case and the law require to be done. The facts as to the relative position of Messrs. *Swire & Son* and the *Union Bank* with regard to the bills in question, seem to me to require no further investigation, because by a letter—which is admitted

(1) Page 1010.
(2) Law Rep. 2 Ch. 795.
(3) 3 Mont. & A. 329.
(4) 2 M. D. & D. 604.
(5) Page 606.

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to have been written for the purpose of dispensing with any further evidence—from *Petrie's* solicitors to the solicitors of the Respondents, the facts are stated thus: They say Messrs. *Swire & Son* had in their possession £2080 of the acceptances of Mr. *Petrie* prior to the registration of the deed, the balance (that is to say) the difference between £2080 and £9732, coming into their possession subsequent to the registration of the deed. Before that balance, amounting to £7652, came into their possession the bills were with the *Union Bank* under discount. It is admitted that that balance turned the scale of the assents to this deed. In that state of circumstances it appears to me to be perfectly clear that the legal holders and owners of the debt to the extent of £7652 were the *Union Bank*, the holders of the bills. They were the persons who, if matters had remained so, would have been the persons to sue *Petrie*, as indorsees and holders of the bills. They were the persons who ought to have been represented as the creditors having a claim against *Petrie* upon this deed. The deed, therefore, in my mind, is vicious in the first place, because it does not describe the *Union Bank* as one of the creditors of *Petrie*, whether they might assent or dissent. But it is vicious beyond that, because it does describe as the proprietors of this debt Messrs. *Swire & Son*. Messrs. *Swire & Son* were not at that time the owners of these bills, nor could they, whatever might have been their dealings with *Petrie*, have sued *Petrie* in respect of the debt represented by these bills, which were outstanding and current in the hands of third parties. Messrs. *Swire & Son* therefore did what, in my opinion, they had no right to do, in representing themselves as the creditors of *Petrie* in respect of this sum of £7652, and their assent to the deed was, therefore, to that extent inoperative.

It has been suggested that by reason of their original dealings with *Petrie*, which led to the giving of these bills, and by reason of the possibility that as drawers of the bills they might upon notice of dishonour be called on to pay them, they were creditors of *Petrie* at the date of the execution of the deed, and might so represent themselves. Now, as regards their contingent liability on the dishonour of the bills, and notice of dishonour given, their only claim could be under the sections which have been

referred to of the Act of 1849. But these sections—the bills being still current and undishonoured—could only give a right either to make a claim or to have a value set upon their liability, but neither was done: and if such a course had been taken I need not say it would not entitle them to represent themselves as the proprietors of the whole debt. As regards their position as creditors by virtue of the original consideration for the bills, it appears to me their case is even worse, because if they come forward claiming to be creditors of *Petrie* for the original consideration for these bills, then, by the statement of *Petrie* himself, it would appear that the bills were given either in the course of or with a view to a joint speculation between *Swire & Son* and *Petrie*, a speculation which was not closed. The loss was only estimated, and the speculation would require to be closed, and the accounts taken or admitted, before *Swire & Son* could claim against *Petrie* in respect of it.

Therefore upon these grounds, which I am happy to think are grounds entirely substantial and not merely formal, and which shew that *Swire & Son* never should have done what they have done, I think the decision of the Commissioner, either proceeding on this ground or any other ground, was right, and the appeal must be dismissed with costs.

SIR C. J. SELWYN, L.J.:—

The first clause of the 192nd section of the *Bankruptcy Act*, 1861, shews that the assent of the creditors may be given before or after the execution of the deed by the debtor, and the 5th clause of the same section requires an affidavit by the debtor to be delivered to the Chief Registrar, shewing that a certain majority of the creditors have assented, that is have then assented. These two clauses, when considered together, clearly shew that the material date in this case is the date of the registration. We must then ascertain who were the creditors at that time. In the case of negotiable instruments the 200th section of the same Act treats the persons by whom the negotiable instruments are holden as the creditors, and the deed in this case, as quoted by the learned Commissioner, states that "whichever of such respective parties to each such negotiable instrument shall ultimately become the real holder thereof for

L. JJ. 1868 *Ex parte* PETRIE. *In re* PETRIE.

value, shall be deemed to be the creditor." The statute, therefore, and the deed now in question concur in recognising the holding for value of the negotiable instruments as the test by which the question as to who is the creditor shall be ascertained. It is admitted that the bills, amounting to upwards of £7000, are sufficient to turn the balance in this case, and the only question to be decided is, who were the holders for value of these bills at the material date, that is, the date of the registration? This question appears to me to be decided by the letter of admission to which the Lord Justice had referred. That letter amounts to this, that at the time of registration the bills were with the *Union Bank* under discount, or in other words, that the *Union Bank* were then the holders of these bills, and consequently the creditors entitled to assent or dissent. It is true Mr. *De Gex* has suggested that Messrs. *Swire & Son* might be considered as the agents of the bank, but there is no evidence of any such agency or of any authority or assent given by the bank.

I think, therefore, this appeal must be dismissed with costs.

Solicitors for the Appellant: Messrs. *J. T. & R. Gole.*
Solicitors for the Respondents: Messrs. *Gregory, Rowcliffes, & Co.*

L. JJ. 1868 *Feb.* 14.

Ex parte ROCHE. *In re* BICKERSTAFF.

Bankruptcy—Practice—Appeal—Affidavit of Service—Notice of Appeal.

The practice on appeal motions in bankruptcy is similar to the practice on motions in Chancery. Therefore where an Appellant in bankruptcy desires to take an order in the absence of the Respondent, he must produce an affidavit of service of the notice of motion before the rising of the Court.

Two clear days notice of an appeal motion in bankruptcy is sufficient.

WHEN this case, which was an appeal from an order of the Commissioner of the *Liverpool* District Court of Bankruptcy, was called on the Respondent did not appear; and a question arose whether, according to the practice of the Court of Appeal in Bankruptcy, it was necessary to produce an affidavit of service when the Respondent made default.

LORD CAIRNS, L.J., after consulting the Registrar, said:—

I understand from the Registrar that since the practice was altered, and appeals in bankruptcy have been made by motion (1), there has been no settled practice as to the evidence of the service of the notice of motion on the Respondent. My learned brother and I are both of opinion that there is no reason why the practice should not be the same as in the case of motions in Chancery. For the future, therefore, it must be understood that when the Appellant desires to take an order in the absence of the Respondent, an affidavit of service must be produced in Court before the rising of the Court on the day on which the appeal motion is heard.

At a later period of the day:—

Mr. *W. Pearson* appeared for the Respondent, and took the preliminary objection that there had been only two clear days' notice of the appeal. He contended that four clear days' notice was necessary in appeal motions as well as in applications to the Court of Bankruptcy in its primary jurisdiction: *Griffith & Holmes'* Bankruptcy (2).

Mr. *Yate Lee*, for the Appellant, contended that since the alteration of the practice by which appeals in bankruptcy are made by motion, it had always been considered sufficient to give two clear days' notice only.

LORD CAIRNS, L.J.:—

It does not appear that there is any enactment or order which prescribes the length of the notice of appeal motions in Bankruptcy. That being so, inasmuch as the primitive jurisdiction was to the Lord Chancellor, although not sitting in Chancery, or to some tribunal exercising the functions of the Lord Chancellor, I think the reasonable construction of the 32nd Rule is, that the appeal motions are to be regulated by the practice of the Court of Chancery. I think, therefore, that two clear days' notice is sufficient.

SIR C. J. SELWYN, L.J., concurred.

Solicitor for the Appellant: Mr. *Wynne.*

Solicitors for the Respondent: Messrs. *Skilbeck & Griffith.*

(1) General Orders of 12 Oct. 1861, Rule 32. (2) Page 813.

L. JJ.
1867
Dec. 14, 16.

Ex parte STOFFEL. *In re* STOFFEL.

Bankruptcy Act, 1849, *s.* 112—"*In Prison for Debt*"—*Outlawry*—*Jurisdiction to order Discharge.*

A creditor obtained judgment against *S.* on a bill of exchange, and not having been able to arrest him under a *ca. sa.*, proceeded to outlawry, and *S.* was arrested under a *capias utlagatum*. *S.*, while in custody under it, was adjudicated bankrupt:—

Held, that *S.* was not "in prison or in custody for debt" within the meaning of the Bankruptcy Act, 1849, s. 112; and that the Court of Bankruptcy had no jurisdiction to order his release.

THIS was an appeal by the bankrupt from an order of Mr. Commissioner *Goulburn* refusing to order his release from custody.

Before the bankruptcy one *Poole*, a bill discounter, had brought an action against *Stoffel* on a bill of exchange for £100 accepted by the latter, had obtained judgment, and issued a *ca. sa.*; *Stoffel* could not be found so as to be taken under the writ, *Poole* thereupon proceeded to outlawry, and ultimately, on the 19th of November, 1867, *Stoffel* was arrested under a writ of *capias utlagatum*. A detainer was also lodged against him by one *Shepherd*, who had recovered judgment on another bill of exchange, and sued out a writ of *ca. sa.*

On the 23rd of November *Stoffel*, being in custody as above, filed a petition for adjudication against himself, and was on the same day adjudicated bankrupt. Within three days he filed his statement of debts and liabilities, and on the 28th of November, having previously surrendered to his bankruptcy, and obtained a protecting order, he applied to the Commissioner, under sect. 112 of the Bankruptcy Act, 1849, to order his release from custody. The learned Commissioner refused the application on the ground that the applicant, being an outlaw, had no *locus standi*.

Mr. *Hadley*, for the Appellant:—

The practice of the Commissioners in bankruptcy supports the application: *Ex parte Metcalf* (1), which is in point as to

(1) Com. Law and Eq. Rep. 2 Bank. and Ins. 3.

outlawry; *Re Evans* (1); *Re Glass* (2); *Re Chauncey* (3); *Re Morecraft* (4). The case of *Hesse* v. *Wood* (5) shews that outlawry is, in fact, a mere process for enforcing payment of a debt, and *Ex parte Helsby* (6) is in our favour as regards its being treated so. The cases in insolvency furnish an analogy in our favour: *Castleman's Case* (7); *Hamlin* v. *Crossley* (8); *Adcock* v. *Fiske* (9). Outlawry is substantially only a process to enforce payment of a debt, and a bankrupt's order of discharge discharges him from it: *Nicholson* v. *Nichols* (10); *Basterfield* v. *Sprye* (11). This places it on the same footing as an ordinary debt. If the Commissioner's view be correct the bankrupt may remain in prison for life. [*In re Hawkes* (12) was also referred to.]

Mr. *De Gex*, Q.C., and Mr. *Burtt*, for *Poole*:—

We say, first, that there is no good bankruptcy, for that an outlaw cannot petition against himself: *Summervil* v. *Watkins* (13); *Aldridge* v. *Buller* (14); *In re Mander* (15). Secondly: supposing there is a good bankruptcy, an outlaw cannot make this application: *Griffith* v. *Middleton* (16); *Loukes* v. *Holbeach* (17). Thirdly: the applicant is not "in custody for debt" within the meaning of the 112th section. Before the Act of 1849 a bankrupt was only protected from arrest: *Ex parte Goldie* (18). This statute gave him a new privilege, but the context shews that the words are not to be extended. An outlaw in custody under a *capias utlagatum* is not in custody for debt, but under a penal process for contempt of Court: *Bacon's* Abridgment, "Outlawry;" *Arding* v. *Holmer* (19); *Basterfield* v. *Sprye; Anon.* (20). Lastly, the application is premature in being made before the appointment of assignees:

(1) 5 L. T. (N. S.) 213.
(2) Ibid. 214.
(3) Ibid. 238.
(4) Ibid.
(5) 4 Taunt. 691.
(6) Mont. 355, 361.
(7) 4 Burr. 2120, 2127.
(8) 8 Ad. & E. 677.
(9) 6 Bing. N. C. 17.
(10) 3 Dowl. Pr. 326.
(11) 6 E. & B. 376.
(12) 3 De G. & J. 70.
(13) 14 East, 536.
(14) 2 M. & W. 412.
(15) 6 Q. B. 867.
(16) Cro. Jac. 425.
(17) 4 Bing. 419.
(18) 2 Rose, 343.
(19) 1 H. & N. 85.
(20) 16 W. R. 144.

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Re Bradley (1); *Ex parte Stuart* (2); *Ex parte Moss* (3). As to the cases cited against us, *Ex parte Helsby* (4) is not in point, it merely went on protecting a witness. *Hamlin* v. *Crossley* (5) turned on very different words in the *Insolvent Act*. *In re Hawkes* (6) is not against us, and contains a dictum by the Lord Justice *Knight Bruce* in our favour.

Mr. *Brough*, for *Shepherd*, referred to *Aldridge* v. *Buller* (7).

Mr. *Hadley*, in reply:—

Paying the debt reverses the outlawry, so that custody under the outlawry must be considered custody for debt.

LORD CAIRNS, L.J.:—

In this case we think the paramount question is, whether the Court has jurisdiction to make the order asked? The jurisdiction in bankruptcy to order the release of a bankrupt who is in prison in a civil suit rests entirely on the 112th section of the Bankruptcy Act, 1849. Here the applicant has, rightly or wrongly, been adjudged bankrupt: he has surrendered and has obtained his protection from arrest. Thus far the terms of the statute have been complied with. The question remains whether he is "in prison or in custody for debt." If he is, the Court has jurisdiction to order his release; otherwise not. He is in custody under two writs; one of such a nature that if in custody under it alone he would properly be described as in custody for debt. The other is a writ of *capias utlagatum* founded on an action upon a bill of exchange. In my opinion, a person taken under such a writ is not in prison for debt. He is in prison because, in the view of the Court in which the action is brought, he has committed a punishable offence. He is in prison not for debt, but for a contempt of Court. He is no more in prison for debt than a Defendant who is committed to prison for want of answer. Not only is this in accordance with the technical and accurate sense of the words, but, as it appears to me, with their substance and with the intention of

(1) 30 L. T. 139.
(2) 9 Jur. (N. S.) 1303.
(3) 11 L. T. (N. S.) 252.
(4) Mont. 355.
(5) 8 Ad. & E. 677.
(6) 3 De G. & J. 70.
(7) 2 M. & W. 412.

the Legislature, which, I think, was, that as the property of the bankrupt and the claims of his creditors were all become subject to the jurisdiction of the Court of Bankruptcy, that Court should have jurisdiction to relieve him from custody for debt. But so soon as you pass beyond pure custody for debt the jurisdiction ends. I think, therefore, that the appeal should be dismissed; and I think that we ought not to give any opinion on the questions whether the learned Commissioner was right in his view that the bankrupt, being an outlaw, had no *locus standi*, or whether such an application ought to be made before assignees have been appointed.

SIR JOHN ROLT, L.J.:—

I am clearly of opinion that the bankrupt is not in custody for debt, but for contempt in avoiding process. If the words had been "in prison or in custody in an action of debt," the case might have been different. The bankrupt's argument is, that the outlawry is a process to recover the debt; but the words of the Act are carefully limited, and the view which we take of them is confirmed by the earlier part of the section, which refers to a bankrupt "in prison or in custody under any process, attachment, execution, commitment, or sentence." But when we come to the words giving power to release the prisoner, we find that they only apply to a person "in prison or in custody for debt." The case is further strengthened by comparing these words with those of the *Insolvent Debtors Act*, 7 Geo. 4, c. 57, s. 50, "the discharge of any prisoner so adjudicated as aforesaid shall and may extend to all process issuing from any Court for any contempt of any Court, ecclesiastical or civil, for non-payment of money or of costs or expenses in any Court, ecclesiastical or civil." It must also be considered that the jurisdiction in bankruptcy applies only as between debtor and creditor, and it is where nothing else comes in that the Court has jurisdiction. I am of opinion, therefore, that this appeal must be dismissed on the ground that the case does not come within the section, the bankrupt not being in prison or in custody for debt; and that we ought not to give any opinion on the other points which have been argued before us.

Solicitors: Mr. *W. H. Smith*; Messrs. *D. & S. Woolf*; Mr. *Chidley*.

L. JJ.
1867
Dec. 21.

Ex parte BAYLEY. *In re* AINSWORTH.

Bankruptcy Act, 1861, *s.* 159—*Debts without reasonable expectation of being able to pay—Discretion of Commissioner.*

Two young men took to a family business of calico printing which was at the time insolvent. They carried it on upon a large scale from November, 1864, to June, 1867, without taking stock. At the end of that time they took stock, and found that the result of their business was a loss of £10,000 for the whole period. Upon this they called their creditors together and became bankrupt. Up to that time they deposed that they had believed they were carrying on business at a profit. One of them, however, admitted that in January, 1867, he had believed the firm insolvent. From January to June the excess of liabilities over assets had increased by £4000, and many debts contracted during that period, chiefly for drugs employed in the printing, remained unpaid. The Commissioner considered that the bankrupts had contracted these debts without reasonable expectation of being able to pay them, and suspended the order of discharge for three months, with protection. The assignee appealed, asking for a heavier sentence :—

Held, by Lord *Cairns*, L.J., that the bankrupts ought to have stopped trading sooner, but that this was not a punishable offence, and that there was not sufficient ground for holding that they had contracted debts without reasonable expectation of being able to pay them :

Held, by *Rolt*, L.J., that, assuming the bankrupts to have contracted debts without such reasonable expectation, the circumstances of the case were not such as ought to induce the Court to interfere with the discretion of the Commissioner by aggravating the sentence. Whether the debts had been contracted without reasonable ground of expectation of being able to pay them *quære*.

THIS was an appeal by the creditors' assignees from an order of Mr. Commissioner *Jemmett* suspending the bankrupts' orders of discharge for three calendar months, with protection in the meantime, the Appellants' complaint being that the sentence ought to have been more severe.

The bankrupts had carried on business in partnership as calico printers. The business was an old family business which had been formerly carried on by their grandfather, and then by their respective fathers, who both died in 1864. Their widows carried it on for a few weeks, and then handed it over, in November, 1864, to their sons, who took to the concern with its assets and liabilities. It appeared that it was at that time insolvent to the amount of £4000. The bankrupts, who were young men, succeeded in

obtaining a large amount of orders, and, as they deposed, were so full of business that they never completed a stock-taking till the latter end of June, 1867, when they found that the deficiency had increased to above £14,000, and that they had been losing at the rate of about £3000 a year. Up to this time they stated that they had believed themselves to be carrying on business at a profit. Upon finding out the real state of their affairs they called their creditors together, and on the 31st of July were adjudicated bankrupts on their own petition.

One of the bankrupts, on examination, admitted that he had in January, 1867, believed the firm to be insolvent, but not to such an amount as was actually the case. He said he thought that they were making profits, and would be able to recover themselves. It now appeared that in January, 1867, the liabilities had exceeded the assets by above £10,000. A large amount of debts incurred since that time, principally for drugs used in the business, were still owing.

Mr. *Pearson*, Q.C., and Mr. *Bardswell*, for the assignees, in support of the appeal:—

The Commissioner considered that the case came within the 3rd clause of sect. 159 of the *Bankruptcy Act*, 1861, for that the debts must be considered to have been contracted without reasonable expectation of being able to pay them. So mild a sentence in such a case is an encouragement to insolvent traders to go on trading when they ought to stop. We ask to have the order of discharge refused, or suspended for three months without protection: *Ex parte Braginton* (1); *Ex parte Barker* (2); *Re Fryer* (3).

Mr. *De Gex*, Q.C., for the bankrupts, referred to *In re Mortimore* (4); *In re Marks* (5).

Mr. *Pearson*, in reply.

LORD CAIRNS, L.J.:—

If the question in this case had been whether the bankrupts, their circumstances being such as they are now proved to have

(1) 14 W. R. 593.
(2) 12 Ibid. 321.
(3) 10 L. T. (N. S.) 197.
(4) 3 D. F. & J. 599.
(5) Law Rep. 1 Ch. 334.

L. JJ. 1867 *Ex parte* BAYLEY. *In re* AINSWORTH.

been, ought to have continued to trade, or to have suspended their trading many months earlier, I should have been clearly of opinion, having regard to what either was or ought to have been within their knowledge, that they ought to have discontinued their trade much sooner than they did. But that is not the question. It may be worthy of the consideration of the Legislature whether a bankrupt should be made liable to punishment for having continued his business too long, but at present there is no law which makes him so. The only question before us is whether the bankrupts have brought themselves within the 159th section of the Act of 1861 by contracting debts without reasonable ground of expectation of being able to pay them. This section is a penal one, and a bankrupt can be brought within it only by averments and proofs as precise as would be required in a criminal proceeding. Now, where a manufacturer buys goods to a reasonable amount for the purposes of his manufacture I cannot say that because he is insolvent at the time he must have bought them without any reasonable expectation of being able to pay for them. These bankrupts might not unreasonably entertain the idea that they should be able to pay for the drugs they bought, and by the use of them make profits which would by degrees pay off their old debts. This is very like the case of *In re Marks* (1), from which I should be slow to depart even if I did not agree with its principle.

SIR JOHN ROLT, L.J.:—

If it were necessary here to deal with the question raised in *In re Marks*, and to determine whether an offence has been committed within the meaning of the 159th section of the Act of 1861, I should require time to consider; but we have not before us any appeal by the bankrupts, and the only question that need, in my opinion, be decided is whether, assuming an offence to have been committed, the punishment ought to be made more severe. It certainly is slight, and if the case had come before me in the first instance I should probably have been disposed to inflict a more severe one; but we ought not to interfere with the discretion of the Commissioner without a clear reason, and I do not think the

(1) Law Rep. 1 Ch. 334.

case one calling for an aggravation of the sentence which he has considered sufficient.

Solicitors: Messrs. *Pritchard & Englefield*; Messrs. *Worthington & Plunkett.*

In re BRISTOW.

Bankruptcy—Non-Trader—Petitioning Creditor—Change of Creditor—Bankruptcy Act, 1861, *ss.* 69, 70, 232—*Bankruptcy Act*, 1849, *s.* 101.

When the petitioning creditor fails to proceed and obtain adjudication on a petition against a non-trader, it is not competent to another creditor to apply for adjudication upon that petition. The 101st section of the Bankruptcy Act, 1849, does not apply to proceedings against non-traders under the Act of 1861.

5 Ch. 172
4 H.L. 668, 672

On the 25th of October, 1867, Mr. *A. Aria*, as a creditor of *Robert Bristow*, presented a petition to the Court of Bankruptcy, praying that he might be adjudged a bankrupt. Several proceedings took place, and on the 27th of December, 1867, before the Commissioner, Mr. *Aria* consented to have his petition dismissed. An application was then made on behalf of Messrs. *Emmanuel*, who were also creditors of *Robert Bristow*, for an adjudication, and the hearing was adjourned. On the 3rd of January, 1868, the Commissioner dismissed the petition and refused to adjudge *Robert Bristow* a bankrupt on the application of Messrs. *Emmanuel*.

Messrs. *Emmanuel* appealed.

Mr. *De Gex*, Q.C., and Mr. *Popham Pike*, for the Appellants, cited *In re Ash* (1), and stated that they had ascertained that *Ash* was a trader. They also cited *In re Hepburn* (2).

Mr. *Druce*, Q.C., and Mr. *Reed*, for *Bristow.*

Mr. *De Gex*, in reply.

LORD CAIRNS, L.J.:—

In this case I do not mean to give any opinion as to the extent to which the 101st section of the Act of 1849 is incorporated into

(1) Law Rep. 1 Ch. 469. 12 Jur. N.S. 518 (2) 36 L. J. (Bkcy.) 48.

L. J. C. 1868 *In re* Bristow.

the Act of 1861, nor any opinion as to the incorporation, or the extent of the incorporation, of any other section of the Act of 1849 in which the word "trader" occurs. I think it quite sufficient to confine the observations I am about to make to the precise case which is now before the Court.

Upon that case, I think the order made by the learned Commissioner was entirely right, and I think that the Appellant's argument is met by fatal objections, both of form, and, what is much more satisfactory as a *ratio decidendi*, of substance.

First, as to form: the Act of 1861, by the 69th section, provides that "all debtors, whether traders or not, shall be subject to the provisions of this Act." The 232nd section provides that "this Act shall be construed together with so much of the Act of 1849 as remains unrepealed as one Act." Taking therefore the words "this Act" in sect. 69, according to an argument used by Mr. *De Gex*, I read that section as saying that "all debtors, whether traders or not, shall be subject to the provisions of this Act read in connection with so much of the Act of 1849 as remains unrepealed." That must mean, that traders shall be subject to such provisions as by the context and the general scope of the Act are applicable to traders, together with the general provisions of the Act which are applicable to everyone; and that non-traders shall be subject to such provisions of the Act as by the context and general scope of the Act are peculiarly applicable to non-traders, and to such general provisions as are applicable to general persons; and we must in each case apply those rules, and find out whether the trader or non-trader is subject to the particular provisions which he is said to be subject to. If it were otherwise this absurd consequence would follow, that in the clause, for example, as to misdemeanors, where it is said that certain persons shall be subject to certain penalties for certain offences, and that traders shall be subject to certain penalties for certain particular offences, if the 69th section meant that persons, traders or not, should be subject to all the provisions, then persons who are not traders would be subject to the penalties for those misdemeanors which are made misdemeanors as to traders only.

Bearing that construction of the 69th section in mind, we must see whether the 101st section of the Act of 1849, which is said to

apply to the case of the bankrupt before the Court, is properly applicable. The earlier part of that section, I should imagine, was superseded, because it simply enacts what has been enacted in more particular and precise form by the Act of 1861, namely that "the Court, under a petition filed by a creditor, shall upon proof of the petitioning creditor's debt, and of the trading and act of bankruptcy of the person against whom such petition is filed, adjudge such person bankrupt." But the section then goes on to say, "or if in case of the failure of the petitioning creditor to proceed and obtain adjudication within three days after his petition shall have been filed, or within such extended time as may be allowed by the Court, another creditor shall apply for adjudication upon such petition, then upon such application and proof of such creditor's debt, and of the trading and act of bankruptcy of the person against whom such petition is filed, the Court shall adjudge such trader bankrupt." Now this is a very special power which would not flow from any other part of either Act. It is a salutary power, though somewhat at variance with what would be the ordinary course of proceeding upon a petition for adjudication, in other words, it is a very strong and high power.

I do not think it necessary to consider the question of what was intended by this power in the Act of 1849. It is obvious that at the time when that Act was passed it could only apply to traders, for no other persons were within the Act in any shape or form, and I do not think I can give the Appellant any greater advantage than to suppose that the clause on which he relies was reprinted *totidem verbis* in the Act of 1861, and so made applicable to proceedings under the Act of 1861. If, then, this sentence had been reprinted in that Act, in my opinion it would not have been possible, having regard to the precise and particular use of the word "trader" there, to extend the words beyond the case of a trader. It would be exactly one of those instances in which the contrast would be thus drawn, in the most marked way, between the case of a person who was a trader and the case of a person who was not a trader.

It was said that the cases of *Hepburn* (1) and *Ash* (2) were decided upon principles which would be inconsistent with this view of the

(1) 36 L. J. (Bkcy.) 48. (2) Law Rep. 1 Ch. 469.

L. J. C. 1868 *In re* Bristow.

case, but I am not of that opinion. The case of *Hepburn* was decided upon sect. 104, and, applying to it the test I have just now applied, the decision in that case was entirely warranted, because if we are to suppose that the 104th section was repeated *totidem verbis* in the Act of 1861, it would have been perfectly possible to apply the whole of it to the case of a trader or a non-trader, as the case might be. The words are so distributed in that section that they may be read applying them to the case of a non-trader, where there is a non-trader, and to the case of a trader where there is a trader.

With regard to the case of *Ash*, no question was raised as to the distinction between a trader and a non-trader, and as the person there was a trader, the question could not have been raised.

So much as to the question of form; but, as I have said, I attach more importance to matter of substance, as a much more satisfactory ground on which to decide a case. Now it is to be borne in mind that under the Act of 1849 an application could be made by petition for an adjudication against a trader behind his back. Of course every such petition alleged an act of bankruptcy, and the Court might adjudicate the person a bankrupt upon that petition, and thereupon a *locus* was given to him for appearing and disputing the adjudication, and in default of his disputing it, or if he disputed it and failed to appear, or if he appeared to dispute it but failed in his contention, then and then only the adjudication was maintained and the bankruptcy proceeded with. In a proceeding of that kind nothing could have been more convenient and nothing could have been more fair, than that if the petitioning creditor delayed to proceed to get an adjudication, some other creditor should be allowed to take up the case, proceeding upon his own debt, in the place of that of the original creditor, and going on to an adjudication; for it was perfectly immaterial to the alleged bankrupt whether those *ex parte* proceedings took place upon the debt of *A* or on the debt of *B*. He had not been served with any petition, and provided it was a proper debt, it was quite the same thing to him whether the proceedings were taken on the debt of one person or on the debt of another. When he had notice of what had been done he would be in a position to dispute the debt upon which the adjudication had been

made. But when we turn to the case of a non-trader, who for the first time was made liable to bankruptcy by the Act of 1861, we find that the Legislature, in his case, acted upon a totally different principle, and in place of allowing any adjudication of a non-trader to take place *ex parte* and without notice, it was a *sine qua non* that the rules which are laid down in sect. 70 should be complied with.

These rules proceeded on the footing that there should be a petition for adjudication, stating the whole foundation of the case, which should be served personally on the debtor, either within the jurisdiction or abroad, as the Court should direct; that it should have a particular indorsement telling the debtor when he should appear; that the time for appearance should in no case be less than thirty days after service; that if personal service had not been effected the Court should be satisfied of certain matters; and if, at the expiration of the time limited for appearance, the Court upon the hearing of the petition should be satisfied that an act of bankruptcy had been committed it might adjudge the debtor to be a bankrupt. It is a proceeding wholly founded upon notice, and it would be contrary not only to the first principles of bankruptcy law, but of every forensic proceeding that we are acquainted with, where you are proceeding upon notice, that you should, in the absence of appearance, and before appearance, entirely shift the foundations of the case upon which you are proceeding; you give notice, or you make preparation to give notice, to the debtor that the proceeding against him is founded on a particular petitioning creditor's debt, which may be peculiar in all its circumstances, and while he is labouring under the belief that that is the proceeding which is going on against him, without his knowledge the scene is entirely changed, and a new proceeding virtually is substituted; as to which the argument not only assumes, but maintains, that he should have had no notice whatever. Mr. *De Gex* put it very fairly, because he said, that one of the reasons why it was desired to pray in aid this section of the Act of 1849, was, that all the forms as to service had been gone through on the one petition, and that if there was to be a new petition under sect. 96 of the Act of 1861, these proceedings would have to be taken *de novo*, and the debtor would require to have notice of what was going to be done. Can anything reduce the argument more to an absurdity,

L. J. C. 1868 *In re* Bristow.

than the confession of the object which the parties have in view, that object being to proceed on a case of which the debtor has not had notice. It appears to me that if the question of form were not in the way, the matter of substance is such as to make it wholly impossible to hold that the substituted process under the Act of 1849 could be permitted in this case. I think the order of the Commissioner was right, and the appeal must be dismissed with costs.

Solicitors for the Appellants: Messrs. *Pike & Son.*
Solicitor for the Respondent: Mr. *R. Lomax.*

L. J. C. 1868 *Jan.* 18.

In re CALTHROP.

Bankruptcy Act, 1861, *ss.* 70, 87—*Adjudication—Limited Company Petitioner—Service on Debtor—Appeal to House of Lords.*

5 Ch D. 34
4 Ch D 747

A limited company can maintain a petition for adjudication under sect. 87 of the *Bankruptcy Act*, 1861, and the secretary can make the necessary oath. In such cases the practice is for the petition to be sealed with the corporate seal, and signed by two directors and the secretary.

A non-trader, much indebted, had left the realm, and an order had been made, under sect. 70 of the Act of 1861, for service of a petition for adjudication on him abroad. His solicitor, with whom he was in communication, was present when this order was made; but gave no information, and declined to accept service. The Petitioners sent a clerk abroad, who was unable to find and serve the debtor. Service of the petition was then ordered to be made on the solicitor, and the debtor was thereupon adjudged bankrupt:—

Held, on appeal from the Commissioner, that under the circumstances the adjudication was good.

Conditions discussed under which leave would be given to appeal to the House of Lords under 12 & 13 Vict. c. 106, s. 18.

THE bankrupt in this case was *T. D. Calthrop*, a solicitor, and the petitioning creditor was the *Agra Bank, Limited*, to whom he was indebted on some bills of exchange.

He was in business in *Whitehall Place*, but, being deeply indebted, he went to *France* in February, 1867. The bank filed a petition in bankruptcy against him on the 15th of March, signed by two of the directors and the secretary, and sealed with the seal

of the company, and supported by an affidavit made by the secretary that *Calthrop* was justly and truly indebted to the company, the act of bankruptcy relied on being departure from the realm.

Proof was given before the Commissioner of *Calthrop* having left the realm; and on the 18th of April an order was made for service of *Calthrop* in *France*. Mr. *Munns*, the solicitor for *Calthrop*, was present at the examination when this order was made, and it appeared that he was in communication with *Calthrop*. He did not, however, state where *Calthrop* was, and declined to accept service. A clerk of the Petitioner's solicitor was then sent to *France*, and went to *Havre* and *Paris*, where *Calthrop* had been, but was unable to find and serve him. An order was thereupon made on the 29th of May for service of the petition on Mr. *Munns*, which was done, and on the 10th of July *Calthrop* was adjudged a bankrupt, no one appearing for him. Notice of intention to dispute the adjudication was given on behalf of *Calthrop*, and he filed an affidavit that the attempts to serve the petition did not come to his knowledge. The application was heard before Mr. Commissioner *Winslow*, and dismissed on the 6th of November.

The bankrupt appealed.

Mr. *De Gex*, Q.C., and Mr. *Reed*, for the bankrupt:—

First: a limited company cannot be a petitioning creditor. Sect. 87 of the Act of 1861, and sect. 89 of the Act of 1849, provide that all proceedings for adjudication must be on the oath of the Petitioner, and only companies who have a public officer are excepted by sect. 92 of the Act of 1849. *Guthrie* v. *Fisk* (1) is a strong authority in our favour. It is clear that there is a difficulty as to a limited company or any other corporation, and perhaps the case has been omitted in the Acts, but the Court cannot add to them.

Secondly: as to service, there has been no sufficient service of the Petition under sect. 70 of the Act of 1861. There is no evidence that the attempts to serve the bankrupt ever came to his knowledge.

Mr. *Roxburgh*, Q.C., and Mr. *Doria*, for the petitioning creditor.

Mr. *De Gex*, in reply.

(1) 3 B. & C. 178.

L. J. C. 1868 *In re* CALTHROP.

LORD CAIRNS, L.J.:—

I do not think that there is any foundation for this appeal. The first objection is, that the petitioning creditor is an incorporated joint stock company, which petitions in its corporate name, and the petition is sealed with the corporate seal, and signed by two of the directors and the secretary. The learned Commissioner says that this is the practice pursued in other cases, and, of course, if that is so the Court would be unwilling to disturb it; but still we must do so if the practice is not warranted by the Act of Parliament. For this purpose the argument assumes that the debt is a proper debt upon which to found the petition of a petitioning creditor, and the objection is to the *status* of the petitioning creditor. Now, in the Act of 1861 I find that in the definition of the terms used in the Act, the word "creditor," unless it be otherwise specially provided, or there be something in the text repugnant, is to mean any two or more persons being partners, and incorporated and joint stock companies; so that where, as in sect. 89, we find that it is provided what shall be the amount of debt of the creditor petitioning for adjudication, that must be read as meaning the amount of debt of any two or more persons being partners, or an incorporated or joint stock company; and so also, putting aside sect. 87, the word "creditor" must be used in every part of the Act. It may be, of course, that from some other provision there may be some fatal impediment to a joint stock company being a petitioning creditor. It is unnecessary to point out the serious inconvenience of holding that to be the law, but the provisions of the Act being such as I have stated, we come to sect. 87, which provides that proceedings to obtain adjudication shall be by petition on the oath of the Petitioner; and then another provision is to be found in the Act of 1849, and in the parallel sect. 92 of the Act of 1861, as to the public officer of a company. Now my opinion is, that the words in sect. 87 are directory, and not meant to abrogate any right previously or otherwise given, but are merely directory as to the mode in which the right is to be asserted, and if the right exists it would be contrary to all principle to construe these words as abrogating that right. The right of a joint stock company may be asserted, and if there could be such a thing as the oath of a corporate body, it would be given under

sect. 87, but as a corporate body cannot make an oath, it is impossible that the petition in the case of a corporate body should be accompanied by their oath. The oath in that case must be made, as has been the practice, by a person competent to speak to the facts alleged on the petition. That oath, as I apprehend, has been given in this case; and it is not suggested that there is any other person who could speak more properly as to the facts. That disposes of the first point.

On the second point, at one time I was disposed to give facilities for bringing an action; but I am not satisfied that an action would raise the main points, and I think it more proper that they should be decided by this Court. The question arises under the provisions as to the act of bankruptcy of a person not a trader, and no doubt these provisions were introduced with great care, in order that this new law applying to non-traders should be applied with every possible safeguard, so that no proceedings might be taken as to which there might not be a reasonable certainty that the subject would be aware of what was going on. Now, the first four articles of sect. 70 of the Act of 1861 point out how the petition is to be served. The 4th article provides that "if personal service has not been effected, the Court must be satisfied that every reasonable effort was made to effect the same, and that the attempts to serve the petition came to the knowledge of the debtor, and were defeated by his conduct," and the Commissioner was satisfied that this was the case. The argument on the other side proceeds upon a fallacy. It was assumed by Mr. *De Gex* that a reasonable effort to effect service must be taken to be what I may term a final effort. A gentleman left this country, and endeavoured to find out the person who was the subject of adjudication. Mr. *De Gex* says, how do you shew that it was ever within the knowledge of Mr. *Calthrop* that this gentleman went to *France*, and that attempts were made to serve him at *Havre* and at *Paris*. There is certainly no proof that any of these attempts were actually known to *Calthrop*, but there lies the fallacy; I think that the attempts to serve the petition must be taken as a whole, and as commencing at a much earlier period, for they commenced when, in the presence of Mr. *Calthrop's* solicitor, efforts were made to ascertain where he was, and whether his solicitor would accept service at the examination

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of April 18th, and they were continued by the subsequent proceedings. I am bound to say that the result of the evidence must be taken to shew that these efforts must have come to the knowledge of Mr. *Calthrop*, considering what is admitted to have occurred, though he might not have known the exact days when the attempts to find him were made. He must have been made aware that the intention was to serve him abroad, and that the best thing he could do would be to move about, and probably to use another name. It may be true, as Mr. *Calthrop* swears, that the attempts to serve him never came to his knowledge; but that is clearly swearing by the card, for he must have known that there was such an intention, though, of course, he would not know what attempts were actually made. The petition of appeal must be dismissed with costs.

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4 Ch D 747

Feb. 8. Mr. *De Gex*, Q.C., applied for leave to appeal to the House of Lords under 12 & 13 Vict. c. 106, s. 18, which provides for an appeal "if the Lord Chancellor shall in any case deem any matter of law or equity brought before him by way of appeal to be of sufficient difficulty or importance to require the decision of the House of Lords;" and 14 & 15 Vict. c. 83, s. 10, which provide that "the appeal to the House of Lords in matters of bankruptcy shall be only on matters of law or equity, or on the rejection or admission of evidence, and on a special case to be approved and certified by one of the Judges of the Court of Appeal."

Mr. *Roxburgh*, Q.C., and Mr. *Doria*, opposed, and cited *Ex parte Bateman* (1).

Mr. *De Gex*, in reply.

LORD CAIRNS, L.J.:—

Of course it would always be very much more agreeable to the Court to find no impediment in the way of its decision being reviewed by a Court of Appeal; but the Legislature has thought fit to impose upon this Court the duty of determining whether in

(1) 5 D. M. & G. 358.

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any case any matter of law or equity is of sufficient difficulty or importance to require the decision of the House of Lords, and that duty the Court must discharge like any other duty which is put upon it. Now, the grounds upon which this appeal is demanded are two. First, that this Court has decided, in conformity with the Commissioner, that a corporation can be a good petitioning creditor under the Act of 1861; but I cannot say that I think this a matter of sufficient difficulty to require the decision of the House of Lords. I may be wrong, but I am bound to express my opinion. Still I cannot say that this is a case of no importance, at all events to the bankrupt, and if there was no other way open, I should be disposed to allow the appeal. I did not advert on the former occasion to the fact that this being a question as to the validity of an adjudication, the Courts of law are entirely open to the bankrupt to dispute the adjudication, by bringing an action and contesting the title of the assignees, which may be done in very much shorter time than would be occupied by an appeal to the House of Lords. Under these circumstances, I should be wrong in making an order which would stop the proceedings in bankruptcy for eighteen months at least, and occasion a very much greater expense than any proceedings at law which the bankrupt might take at his own peril.

The second question is very different. The 70th section gives certain directions as to serving the debtor out of the jurisdiction, and as to the time allowed for him to appear, and as to the course to be taken on failure to effect such service. To the courses so laid down the Court of Bankruptcy ought to adhere; and the learned Commissioner thought, and I concurred with him in thinking, that these provisions had been complied with. I do not mean to say that in the decision which I gave there was not a scintilla of law, but still it depended upon the question of fact of which I was the judge, and I came to the conclusion that the debtor knew of the proceedings; and I think that I should be entirely departing from my duty if, upon this fragment of law, I should allow the expense of an appeal to the House of Lords to be incurred.

5 Ch. D. 34

This application is refused; and I should have refused it with costs, but I think the question of a corporation being petitioning

L. J. C. 1868 *In re* CALTHROP.

creditor is of importance, though I also think that it can be tried at law.

Solicitors for the Bankrupt: Messrs. *Lewis, Munns, & Co.*
Solicitors for the Creditors: Messrs. *Ashurst, Morris, & Co.*

L. J. C. 1867 *Nov.* 23.

Ex parte DELAUNAY. *In re* PILLING.

Bankruptcy Act, 1861, *s.* 197—*Deed of Assignment under Schedule D.—Order to pay Dividend to a Creditor.*

Where a debtor has executed a deed in the form of Schedule D. to the *Bankruptcy Act*, 1861, the Court of Bankruptcy has jurisdiction, under sect. 197, to order the trustee to pay a dividend to a creditor.

IN this case *David Pilling* had executed a deed, dated 21st October, 1864, in the form of Schedule D. to the *Bankruptcy Act*, 1861. This deed was duly registered. The Appellants were the trustees of an ante-nuptial settlement made by the debtor, under which they claimed to be creditors for £10,500, and they had, as such, assented to the creditors' deed. On the 4th of September, 1867, the Commissioner of the District Court at *Manchester*, on the application of the Appellants, made an order for the trustee to divide the funds in his hands among the creditors, reserving a sufficient sum to answer costs. The trustee thereupon paid a dividend of 9*d.* in the pound to the other creditors, but not admitting the right of the trustees of the settlement to rank as creditors, he did not pay them anything. He had not taken any proceedings to shew their claim to be invalid. The Appellants then applied to the Commissioner to order the trustee to pay a dividend to them, but the Commissioner considered that he had no jurisdiction, and declined to entertain the matter.

Mr. *Little*, Q.C., and Mr. *Robinson*, for the Appellants, referred to the *Bankruptcy Act*, 1861, s. 197; *Ex parte Hodges* (1); *Ex parte Lees* (2).

Mr. *Reed*, for the trustee of the creditors' deed.

(1) Buck, 524. (2) 3 Deac. 287.

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Ex parte DELAUNAY. *In re* PILLING.

LORD CAIRNS, L. J.:—

I do not entertain any doubt as to the jurisdiction of the learned Commissioner in this case. The deed was in the form of Schedule D. to the Act, and in such a case the 197th section gives to the Court the same powers as in bankruptcy. I think that the Commissioner had full jurisdiction to entertain the application; and it must be referred back to him to proceed with the matter. He will consider whether an order for payment ought to be made, or an opportunity given to the trustee to dispute the debt.

Solicitors for the Appellants: Messrs. *Pritchard & Englefield.*

L. J. R.
1867
Dec. 7.

Ex parte SPOONER. *In re* HAMMOND.

Bankruptcy Act, 1861, *s.* 223—*Costs of Prosecution.*

The Commissioner of a district Court of Bankruptcy made an order directing the assignee to be the prosecutor in criminal proceedings against the bankrupt for offences under the 221st section of the *Bankruptcy Act*, 1861, but stating it not to be intended by the Court, or required by the assignee, that the extra costs should be paid out of "The Chief Registrar's Account," and ordering them to be paid out of the bankrupt's estate, and if that was insufficient, by the prosecutor. At the same time a certificate in common form was granted, under the 223rd section of the Act, not referring to the order, nor imposing any condition:—

Held (reversing the decision of the Commissioner) that, notwithstanding the order, as an unconditional certificate had been given in the form required by the Act, the costs must be paid out of "The Chief Registrar's Account":

Held also, that the assignee's costs of the appeal ought also to be paid out of the same account.

THIS was an appeal by the creditors' assignee from an order of the *Birmingham* Court of Bankruptcy refusing to order his costs of a prosecution to be paid out of "The Chief Registrar's Account."

On the 13th of March, 1867, an order was made by the *Birmingham* Court, on the application of *Spooner*, the creditors'

L. J. R. 1867 *Ex parte* SPOONER. *In re* HAMMOND.

assignee, that criminal proceedings, or a prosecution, might be commenced against the bankrupt in respect of offences under the 221st section of the *Bankruptcy Act*, 1861. The order directed that *Spooner* should be the prosecutor, and proceeded as follows:—"And the Court doth, in pursuance of the 223rd section of the *Bankruptcy Act*, 1861, hereby grant to the said *F. Spooner* a certificate of the Court having so directed him to be the prosecutor aforesaid. But it is not the intention of the Court, and the assignee does not require, that any expenses incurred by such prosecution beyond those allowed by the Court before which the said *A. Hammond* shall be tried, and which are to be borne and paid as in the said Act mentioned, shall be paid out of the account intituled the 'The Chief Registrar's Account.' And this Court doth order that such extra costs shall be paid out of the estate of the said *A. Hammond*, and if such estate be not sufficient to pay the same, then the deficiency shall be made good by the said *F. Spooner* personally."

At the same time, a certificate was given stating simply that the Court had directed criminal proceedings, or a prosecution, and had directed *Spooner* to be the prosecutor, and containing no reference to the special provisions of the order.

The bankrupt was accordingly prosecuted. He was found guilty and sentenced to imprisonment. The prosecutor was allowed by the Court of Assize £36 for the expenses of the prosecution. His costs were taxed at £128, thus leaving £92 unpaid. He then applied to the *Birmingham* Bankruptcy Court for payment of the balance out of "The Chief Registrar's Account," and the Commissioner having, on the 13th of November, 1867, refused to make an order, the present appeal was brought.

Mr. *De Gex*, Q.C., and Mr. *Harington*, for the Appellant, referred to *Rex* v. *Hewes* (1); *Rees* v. *Waters* (2); *In re Levi* (3); and contended that the direction of the Commissioner as to costs was *ultrà vires*, sect. 223 being imperative as to the mode of payment.

The *Solicitor General* (Sir *C. J. Selwyn*), and Mr. *H. B. Miller*,

(1) 3 Ad. & E. 725. (2) 16 M. & W. 263.
(3) Law Rep. 2 Ch. 493.

for the Chief Registrar in Bankruptcy, the Registrar for the *Birmingham* Court, and the official assignee :—

This is, in reality, an appeal against the order of the 13th of March, and is out of time. The order of the 13th of November is merely consequential, and cannot be disturbed while the former order stands. The former order must have been a consent order. The Commissioner had a discretion whether he would direct a prosecution or not, and he therefore could impose terms on the person applying for it, and the assignee having obtained that order must abide by its terms.

SIR JOHN ROLT, L.J. :—

I think that the fact of the order of the 13th of March having been obtained by the assignee is immaterial in determining what effect is to be given to it. In addition to that order a certificate was given, such as is required by the 223rd section of the Act, and not containing a word about its being given to carry into effect any particular arrangement. The Act having said that the costs are to be paid in a particular way, and the assignee producing a certificate in the form required by the Act, what jurisdiction have I to say that the costs are not to be paid according to the Act? The Commissioner, by his order, states that he had a particular intention in issuing the certificate, but I cannot give effect to that.

Mr. *De Gex* asked that the assignee's costs of the appeal might be added to the costs of the prosecution, and paid out of the Chief Registrar's account, as "being expenses incurred by such prosecutor," within the meaning of sect. 223.

HIS LORDSHIP thought that the assignee's costs of the appeal came within those words, and made an order accordingly.

Solicitors : Messrs. *Aldridge, Bromley, & Thorn ;* Messrs. *Dyne & Harvey.*

L. JJ.
1867
Dec. 11, 12.

HOOLE *v.* GREAT WESTERN RAILWAY COMPANY.

Railway Company—Payment of Dividend in Preference Shares—Shareholder's Bill—Parties—Ultrà vires.

A railway company had power to raise additional capital by the issue of shares, and to allot to them a preferential dividend, it being enacted that dividends should not be paid out of any moneys received for the shares, and that no share should be issued until one-fifth of the amount had been paid. The revenue of the company during a particular half-year was sufficient to pay a dividend, after providing for all charges properly payable out of revenue, but, owing to the refusal of creditors of the company to give time, the revenue was absorbed in payment of sums properly chargeable to capital. In these circumstances the company in general meeting sanctioned a plan for offering to each shareholder, at par, preference shares to an amount equal to the dividend which would have been payable to him if the revenue had not been diverted for capital purposes. These shares were saleable, but only at a considerable discount. A shareholder filed his bill, on behalf of himself and the section of shareholders to which he belonged, to restrain the issue of shares for the above purpose, to have those already issued cancelled, and to restrain the payment of dividends on them:—

Held, that the scheme was *ultrà vires*, for, assuming that the shares could lawfully be issued at a discount (an issue under this scheme being in reality an issue at a discount), and assuming that owing to the diversion of the revenue to capital purposes they could lawfully be treated as assets for payment of a dividend, each shareholder who was not willing to accept an allotment of them in specie had a right to insist that the proceeds of the whole should be applied rateably in payment of a dividend to all the shareholders.

An individual member of a corporation may maintain a bill in his own name, without suing on behalf of other persons as well as himself, to restrain the corporation from doing an act which is *ultrà vires*.

Held, that those shareholders who had accepted the shares offered to them according to the above scheme were sufficiently represented for the purpose of these proceedings by one of the directors who had accepted such shares, and had them registered in his name; but, *semble*, the Court would grant no relief affecting the rights of absent shareholders.

Order of *Wood*, V.C., affirmed.

THIS case came before the Court on a motion by way of appeal from an order of Vice-Chancellor *Wood* granting an injunction against the company, and on appeal from an order of His Honour overruling a demurrer by the company.

By the 24th section of the *Great Western Railway (Further*

Powers) *Act*, 1866, the *Great Western Railway Company* were empowered to raise, by the creation of shares or stock in their joint undertaking, such sum or sums of money as they thought fit, not exceeding in the whole £1,220,953, in addition to their previous capital; but no portion of such sum was to be raised without the authority of a general or special meeting of the company. The company were also empowered, by sect. 27, with the consent of three-fifths of the votes of the shareholders at a meeting convened with special notice of such object, to assign to any stock or shares which they might create under the powers of the Act such amount of preferential dividends as they thought fit, not exceeding £6 per cent. per annum on the amount of such stock or the amount paid up on such shares. The 30th section was as follows:—"The company shall not issue any share created under the authority of this Act, nor shall any share vest in the person accepting the same, unless and until a sum not being less than one-fifth of the amount of such share shall have been paid in respect thereof." Sect. 32:—"Every person who becomes entitled to a new share created by the company under this Act, shall, in respect of the same, be a shareholder in the company, and shall be entitled to a dividend with the other holders of shares of the same class or description proportioned to the whole amount from time to time called and paid on such new shares." Sect. 99 contained this provision:—"The company shall not out of any money by this Act authorized to be raised by calls or by borrowing pay interest or dividend to any shareholder on the amount of the calls made in respect of the shares held by him."

By the *Great Western* (*Vale of Neath Amalgamation*) *Act*, 1866, the *Vale of Neath Railway Company* was amalgamated with the *Great Western Railway Company*. By this Act the proprietors of shares and stocks in the *Vale of Neath Railway* became proprietors of shares and stocks of the like description in the *Great Western Railway*, with the same rights, privileges, and priorities *inter se* as they had in the *Vale of Neath Company;* and they were to form a distinct section of proprietors, distinguished as "*Great Western* (*Vale of Neath*) *Proprietors;*" the other proprietors forming three distinct sections, distinguished as "*Great Western* (*Original*) *Proprietors*," "*Great Western* (*West Midland*) *Proprietors*," and

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"*Great Western* (*South Wales*) *Proprietors*." The Act contained provisions for ascertaining the net revenue of the whole undertaking, and for carrying it, in certain specified proportions, to the separate revenue accounts of the different sections of proprietors; it then provided for crediting the separate revenue accounts respectively with certain sums, and for deducting certain sums to which the sections were severally liable, and then proceeded as follows:—Sect. 50: "After making such deductions as aforesaid, and also any other deductions to which each such separate revenue account shall be separately and distinctly liable, a balance of each of the accounts shall be struck, and such balance shall be the net separate revenue available for appropriation to and among the proprietors of the separate section of proprietors to which it belongs, and shall be dealt with as hereinafter provided." Sect. 51:—"The company shall pay and satisfy the interest, charges, debts, and liabilities which, under the provisions of this Act, are chargeable to the respective separate revenue accounts of the *Great Western* (*Original*) *Proprietors*, the *Great Western* (*West Midland*) *Proprietors*, the *Great Western* (*South Wales*) *Proprietors*, and the *Great Western* (*Vale of Neath*) *Proprietors*, and shall appropriate, apportion, and pay the respective net separate revenues of the *Great Western* (*Original*) *Proprietors*, the *Great Western* (*West Midland*) *Proprietors*, the *Great Western* (*South Wales*) *Proprietors*, and the *Great Western* (*Vale of Neath*) *Proprietors*, ascertained respectively as in this Act mentioned, to and among those proprietors respectively, according to their respective rights and interests, and according to their several priorities *inter se*, as would have been done if such revenues had been revenues of the *Great Western Company* and of the *Neath Company* respectively before the amalgamation effected by this Act." Sect. 99:—"It shall not be lawful for the company, out of any money by this Act or any other Act relating to the *Great Western Company*, or the *Neath Company*, authorized to be raised by calls in respect of shares, or by the exercise of any power of borrowing, to pay interest or dividend to any shareholder on the amount of the calls made in respect of the shares held by him in the capital of the company by this or any of the Acts relating to those companies authorized to be raised: provided always, that nothing hereinbefore contained

shall be deemed to prevent the company from paying to any shareholder such interest on money advanced by him beyond the amount of the calls actually made as shall be in conformity with the provisions in '*The Companies Clauses Consolidation Act*, 1845,' in that behalf contained."

By a special general meeting held on the 12th of October, 1866, the directors of the *Great Western Railway Company* were authorized to issue £6 per cent. preference shares of £20 each, under the provisions of the *Further Powers Act*, 1866, and a considerable amount of these shares was issued.

On the 2nd of March, 1867, the directors issued a report to be presented to the half-yearly meeting of the company to be held on the 8th of March. This report, after stating that there was a balance on the working of the past half-year sufficient, after providing for all fixed or preference charges, to pay the dividends therein mentioned to the several sections of ordinary proprietors of the company, contained also the following statement:—"Having regard to the large and exceptional extent to which the revenue has necessarily been appropriated in discharge of temporary loans and other liabilities on capital account, which, but for the unusual state of the money market, and the distrust of all railway securities, would have been defrayed by the issue of preference stocks, the directors have no alternative but to recommend that the payment of the dividends on the ordinary capital should be deferred. They are of opinion that this course, however inconvenient to individuals, is the only one by which the financial position of the company will be placed in a position which will inspire public confidence, and by which its credit will be maintained."

The meeting of the 8th of March was adjourned to the 29th of March in consequence of the pendency of negotiations for raising money to meet the pressing liabilities of the company. These negotiations proved abortive, and the directors presented a report to the adjourned meeting, in which they recommended that the shareholders, both preferential and ordinary, should be paid their respective dividends in preference stock until the temporary loans were paid off, and the finances of the company put in a sound and safe position. The report proceeded:—"In lieu of dividend warrants, it is therefore proposed that irredeemable preference shares

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of £20 each, authorized by the Act of 1866, bearing interest at £5 per cent., should be issued to each shareholder in exchange for an equivalent amount of dividend. For any fraction of a dividend not amounting to £20 an obligation would be given, such obligations being convertible into shares when presented in amounts of £20, the holders being at liberty to pay up any difference in cash."

The adjourned meeting was held on the 29th of March, and a resolution was thereat passed authorizing the directors to pay the dividends on all shares and stocks, both preference and ordinary, by the issue of irredeemable fully-paid-up £6 per cent. preference shares created and issued under the provisions of the Act of 1866. The directors accordingly sent to the shareholders provisional certificates for fully-paid-up £20 preference shares in payment of their dividends, with vouchers for the fractional parts.

In August, 1867, the directors proposed to pursue a similar course for payment of a dividend, giving the shareholders an option to take either £6 per cent. preference stock or £5 per cent. debenture stock. This course was sanctioned by a general meeting on the 30th of August, and the 1st of October was fixed as the day for issuing the provisional certificates.

It was alleged by the bill, and was not disputed, that the £6 per cent. preference stock, and £5 per cent. debenture stock, were not saleable in the market except at a price considerably below par.

On the 7th of September, 1867, the Plaintiff, who was the holder of £5000 ordinary stock in the *Vale of Neath* section of the company, filed his bill on behalf of himself and all other the *Vale of Neath* proprietors (except those who were Defendants) against the company, its directors, and its secretary. The bill stated at length the Acts of Parliament and the several proceedings mentioned above, and alleged that *Thomas Bassett*, one of the directors, and a Defendant to the suit, was a *Vale of Neath* shareholder, and had accepted fully-paid-up preference shares in lieu of dividend, and that they had been registered in his name. The bill alleged that *Bassett* and some (if not all) of the other Defendants were interested in establishing the right of the company to issue fully-paid-up shares in lieu of dividends, and that *Bassett* and such Defendants as aforesaid represented sufficiently for the purposes of the suit all the persons who were interested in establishing

such right. The bill also alleged that some of the directors were holders of large amounts of shares and stock in the company other than shares and stock belonging to the *Vale of Neath* proprietors; and that they sufficiently represented for the purposes of the suit all the holders of such shares and stock other than aforesaid. The bill prayed for a declaration that the company were not entitled to issue shares or stock for the purpose of paying dividends, and also prayed that provision might be made for the cancellation of any preference shares or stock already issued in lieu of dividend, and for an injunction in the meantime to restrain the company from paying dividends on such shares and stock, and for an injunction to restrain the company and their directors from creating or issuing any preference shares or stock for the purpose of paying dividends therewith.

The company demurred to the bill for want of equity and for want of parties, and on the 14th of November Vice-Chancellor *Wood* overruled the demurrer. The Plaintiff then moved for an injunction to restrain the company from issuing stock or shares in lieu of dividends, and from declaring any dividend upon any shares so already issued. The evidence on behalf of the company need not be entered into in detail, it will be sufficient to state its general effect, which was, that the revenue of the company during the two half years in question had been sufficient, after debiting it with everything properly chargeable to revenue, to pay the dividends in lieu of which stock or shares had been or were proposed to be issued; that the reason for not paying the dividends in cash was that, owing to the general distrust of railway securities, the holders of debentures which formed a charge on the capital of the company would not renew; that the revenue of the company had been absorbed in payment of these claims, and that therefore what was being done was not a payment of dividends by means of the issue of shares within the meaning of the Acts, being only a recouping the revenue account what had been taken out of it for capital purposes. The Vice-Chancellor, on the 21st of November, granted an injunction restraining the company from issuing shares or stock in payment of dividends, and gave liberty to apply, in case of a dividend being declared on any shares or stock which had already been issued for that purpose. (2)

(1) See 2 H. & M. 266
(2) See 2 H. & M. 273.

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The *Solicitor-General* (Sir *C. J. Selwyn*), Mr. *Kay*, Q.C., and Mr. *T. Stevens*, for the Appellants.

The nature of the arguments will sufficiently appear from the judgments. [*Henry* v. *Great Northern Railway Company* (1), *Carlisle* v. *South-Eastern Railway Company* (2), were referred to.]

Sir *Roundell Palmer*, Q.C., Mr. *Amphlett*, Q.C., and Mr. *E. R. Turner*, for the Plaintiff, were not called upon.

During the argument for the Appellants, their Lordships asked whether the company would give an undertaking not to issue any further stock for the purposes of paying dividends until the hearing. The company declined to give any undertaking.

LORD CAIRNS, L.J.:—

I am anxious to do complete justice to the motives, so far as I can form an opinion upon them, which have led the company, and the executive of the company, and the general meetings, to suggest, and, as far as they could, to carry into effect, the arrangement that has been made as to the allotting shares for the purpose of satisfying the dividends. I believe that it was an arrangement which all the parties to it believed to be most advantageous to the company, and to every person concerned; and, as far as it is proper to feel regret, one may feel regret that the arrangement did not meet with the unanimous assent of all the shareholders. With that, however, we have nothing here to do; if the arrangement which has been proposed is legal, is *intrà vires*, the company, through their general meetings, have power to carry it into effect; if, on the other hand, it is *ultrà vires*, if it is illegal, any member of the company may dissent from it, and has a right to appeal to this Court to be protected against its effects.

Now, that *primâ facie* the Act of Parliament, according to its wording, is violated by this arrangement, I think there can be no doubt. The 99th section of the Act of 1866, called the *Further Powers Act*, provides that the company shall not out of any money by this Act "authorized to be raised by calls in respect of shares, or by the exercise of any power of borrowing, pay interest or

(1) 1 De G. & J. 606, 3 Jur. N.S. 1133. (2) 1 Mac. & G. 689.

dividend to any shareholder on the amount of the calls made in respect of the shares held by him." Now the object in the present case is to pay to the shareholders dividends upon their shares, that is to say upon the calls made upon their shares. The means by which it is proposed to do this is, by allotting to each shareholder, at a certain value, a share, or more than one share, in the company, in lieu of dividend. That clearly is paying a dividend upon shares by shares, and therefore since shares imply calls, by calls upon shares authorized to be issued under the Act. Then the 30th section enacts, that "The company shall not issue any share created under the authority of this Act, nor shall any share vest in the person accepting the same, unless and until a sum not being less than one-fifth of the amount of such share shall have been paid in respect thereof." Speaking, again, of the letter of the enactment, it is quite clear that in respect of these shares proposed to be allotted one-fifth of the amount of the shares has not been paid. Therefore, *primâ facie*, the arrangement seems one beyond, and contrary to, the letter of the Act of Parliament.

It is possible, however, that the arrangement, although beyond the letter, and contrary to the letter, of the Act of Parliament, may be explained and be shewn to be nothing more than the mere repayment to the revenue account of a sum of money due to that account, and to be a mere equivalent to the more circuitous process of first selling a share in the market, and then by means of the proceeds recouping the revenue account something which is due to it. The question however, arises, is that the real nature of the transaction? I will assume in favour of the company (though I agree with the Vice-Chancellor that the statements in the bill are not clear to that effect), that it would be a right and proper thing, as between the revenue account and the capital account, that the revenue account should be recouped out of the capital account a sum of money which would be sufficient to pay the whole of this dividend, by reason of the revenue account having been diverted for capital purposes during the course of the two half years in respect of which dividends have been declared. But observe the course which the matter takes. A dividend can only be declared upon the assumption that there is either money

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in hand to pay it, or that there is money which ought to be brought into the revenue account for the purpose of paying it. If, when the dividend comes to be payable, there is not money in hand sufficient to pay it, what should be done? If the revenue account is entitled to be recouped, the natural and ordinary process would be at once to take steps, by means of the raising of capital, for recouping the revenue account out of the capital account? Why is this not done? The answer given by the company is, "we have got abundantly sufficient capital wherewith to recoup the revenue account, but that capital is in the shape of unissued shares, which at this moment are saleable at a discount, but not otherwise." That appears to me to place the company in this dilemma:—If these shares are saleable at a discount, and if it be legal for the company to sell them at a discount, then the obvious course for the company to take would be, to sell the shares at the discount at which they are saleable, and by means of the proceeds to pay, so far as the proceeds will extend, every person entitled to a dividend, according to a rateable proportion. If, on the other hand, it would be illegal, and contrary either to the letter or the spirit of the legislation upon the subject, to sell these shares at a discount, then (putting aside for the moment any question of the unequal operation upon the different shareholders) the case stands thus:—here is a shareholder who is entitled to ask for and receive a dividend, but his title to receive it of course depends upon the existence of money in the hands of the executive of the company wherewith to pay it—he is told that there is no money in hand—that at a future period there may be money in hand, if he chooses to wait for it; but that if he prefers he may at once take at par a share which is of the same nominal amount as his dividend, and may be immediately sold, but only at a discount. Now, if he is willing to take the share on these terms it must be for this reason, that he would rather have in the shape of an immediate payment a less sum than he would be entitled to if he waited till the dividend could be paid. The result, therefore (disguise it as you may), is, that he becomes the purchaser of the share at a discount; and, in return for something which is less than the full nominal amount of the share, he becomes the proprietor of the whole nominal amount of the share in the capital in the company.

a share which from that moment commences bearing fruit, and will entitle him in future years to a dividend.

But, passing from that, let us consider in the next place the effect which this operation has as between different shareholders in the company. The right of each shareholder as regards a dividend is clearly prescribed by the 51st section of the *Amalgamation Act*, which provides that after all the accounts which are there prescribed are taken, and the sum is ascertained which is to be applied as a dividend among the proprietors in each section, that sum is to be divided among those proprietors according to whatever their rights and interests may be, that is to say, reserving for those who have rights of priority or of preference the proper measure of those rights, there is to be an equal and rateable division among all the shareholders. Now, as regards the arrangement that is proposed, there are a certain number of persons whom it suits to increase their stake in the company, and to take shares; there are certain other persons (and it may be, the Plaintiff is one) who do not wish to take shares, but wish to get whatever they are entitled to in the shape of money. If what was proposed was, that every shareholder should have an option to take shares at a certain price, or if he did not like that, to take his money, that, (subject to the question I have passed from, as to allotting shares at a discount), would appear to be a perfectly equal arrangement, under which any person who chose might take the shares, and anyone who declined might receive his dividend in money, so that no complaint could be made on the ground of unfairness. But the offer made is substantially this—you, shareholder *A.* must either take this £100 share as worth £100, although it is not worth so much, or you must wait for that indefinite period mentioned in the report, at which it is expected there will be money to pay the shareholders in cash. There, again, as it appears to me, the company are involved in a dilemma; either these shares are assets available for the purpose of paying the dividend, or they are not. If they are not assets available for paying the dividend, they cannot be issued for the purpose of such payment. If, on the other hand, they are assets for that purpose, and the whole of the shareholders are not willing to take them in specie, it appears to me that every shareholder in the company who is so inclined has the clearest right to have

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them turned into money and to have the money rateably divided among the shareholders. If it be said in answer, that the assets cannot be turned into money because they are not at present saleable except at a discount, but will hereafter be saleable at their full value, then the rejoinder is, that every shareholder has a right to say they shall be kept until the time arrives when they will be saleable at their proper value. It appears to me that it is impossible to escape from the conclusion that, if saleable, they must be sold for the equal benefit of all, and if not saleable must be kept for the equal benefit of all. It seems to me that the equity of the bill is perfectly clear, and that the order for the injunction as regards equity is entirely correct.

The demurrer for want of parties is rested on two grounds. In the first place it is said that the Plaintiff is suing on behalf of himself and all other the *Great Western* (*Vale of Neath*) proprietors, that is to say on behalf of one section out of the four into which the proprietary of the *Great Western Railway* is divided, and does not sue on behalf of the whole proprietary, nor profess to represent in any special manner the four other branches of the proprietary. Now, it is perhaps not necessary to decide the question, but I own I have a very strong opinion that any corporator or member of a company may maintain a bill against the corporation and the executive to restrain them from doing an act which is *ultrà vires*, and therefore illegal; but if it be necessary that the bill should be in some sort what is called a shareholders' bill, that is, a bill on behalf of some other persons as well as the Plaintiff, then it seems to me it is enough for the Plaintiff to file his bill on behalf of that section in which he is a shareholder, the other four sections of the company being sufficiently represented by the corporation. I think, therefore, that the demurrer for want of parties cannot be maintained upon the first ground. There is, perhaps, a little more difficulty upon the second ground, which is this—the Plaintiff asks, in the second paragraph of the prayer of his bill, that provision may be made for the cancellation of any preference or other shares or stock, or any debenture stock, which may have been created and issued for the purpose of paying any such dividends or interest as aforesaid; and that in the meantime the company and their directors, and their respective servants and agents, may be re-

strained by the order and injunction of the Court from paying any dividend or interest on any preference or other shares or stock, or on any debenture stock, created and issued for the purposes aforesaid. I do not know that the first of these clauses necessarily points to relief affecting the individuals holding, as purchasers or otherwise, that stock, because it might well be held rather to indicate a request to the Court to order the executive of the company to take steps under their own responsibility and at their own expense for cancelling or getting in stock which they had improperly issued; but the second clause I agree asks for an injunction which, if granted, might affect the holders of the stock already issued. In my observations upon this point I deal with it simply as a question of pleading, and not as suggesting in the slightest degree any opinion that persons who have purchased this stock in the market can in any way be affected by considerations as to the title under which the original allottees acquired it. Dealing, then, with the simple question of pleading, if that part of the prayer which I have read requires the persons holding this stock to be represented in the suit, no further representation can, I apprehend, be required than the having some person present as a party who is in the same position with the holders of the stock. Now we find in the 22nd paragraph of the bill, this allegation, "The Defendant, *Richard Bassett*, is a *Great Western* (*Vale of Neath*) proprietor, and has signed the form appended to his provisional certificate, requesting the shares allotted to him to be registered in his name, and the same have been so registered." If, then, it is necessary that the interests of the persons holding this particular stock should be represented, I am not able to see any reason why Mr. *Bassett* does not effectually represent them. The reason assigned for his not being a proper representative seems to me the strongest possible reason for shewing that he is one. It is said that he is one of the directors—but it is the directors who have originated and carried into effect, as far as it has been done, the arrangement in question, therefore he has a double claim to represent the holders of this stock. First, he himself is a holder of it and has a personal interest in the matter; and, secondly, he is one of the originators of the arrangement for allotting this stock in this way, and therefore must be supposed to have the strongest

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possible desire to contend that the arrangement is a proper and legal one. I think, therefore, that Mr. *Bassett* adequately represents for this purpose the holders of that stock. I should add that the objection seems to me to be an entirely technical one, and to be sufficiently met by a technical answer, for before the Court would do anything in the way of granting an injunction or any other relief, it would, I apprehend, be most careful that nothing in the injunction or the relief should affect the rights of any of the absent holders of the stock. The demurrer, therefore, for want of parties, as it appears to me, fails, and I think that the order overruling the demurrer, and the order granting the injunction, were both correct, and that this appeal should be dismissed with costs.

I desire to add, in expressing my concurrence with the order of the Vice-Chancellor, that I do not forget the passage at the end of the order, that the Plaintiff is to be at liberty to renew the notice of motion as to dividends in case of any dividend being declared or announced upon any shares or stock already issued. In expressing my concurrence with the whole of the order I wish it to be distinctly understood that I am very far from suggesting even the possibility of persons who have acquired stock or shares of this kind by purchase in the market being affected by any of the circumstances under which the stock was issued.

SIR JOHN ROLT, L.J.:—

The Defendants having declined to give any undertaking in the terms of the order appealed from, the decision of the appeal cannot possibly be avoided, whatever inconvenience (if any) may result in respect of those shares which have been already issued under the arrangement complained of. I think that the question does not depend upon misconduct, or anything having any taint or suspicion of fraud. The only question is, whether the directors and the company have or have not the power to do what they have attempted. It is possible, and very probable, that the arrangement proposed is very beneficial, and if it were within the power of the company the decision of the majority might, upon the principle adopted by this Court in *Mozley* v. *Alston* (1), and *Foss* v. *Harbottle* (2), be

(1) 1 Ph. 790. (2) 2 Hare, 461.

held to govern, but if the scheme proposed be altogether beyond their power, then we have nothing to do with its merits, but have only to see that the company do not exceed their powers.

Now it seems almost to be admitted, and it scarcely admits of argument, that they are violating the letter of their Acts, for they are proposing to pay dividends out of money authorized to be raised by calls. Shares have been created, and they propose to issue those shares as paid-up shares, that is, the calls upon them are to be deemed paid. Now with those calls, which are thus to be deemed paid, they propose to pay the dividends due to those to whom they issue the shares, which is a violation of the terms of the Act. This, however, as has been said by the Vice-Chancellor, and repeated to-day, may admit of explanation — there may be something to be found in the bill in considering the demurrer, or in the affidavits in considering the motion, which tends to explain this, and to shew that in spirit and in substance there has been no violation of that provision. Is there anything of that kind either in the bill or in the affidavits. Suppose, first of all, that the case had been this, that they had, for the express purpose of paying the dividend, issued these shares to the public at such a price as they could get for them, and proposed to pay the dividend with the money raised by the issue of them, or with the calls which would have been paid upon them. That, in terms, would also have been a violation of the 99th section, but might possibly have been capable of explanation in some such way as this—the company might have said, "We had £200,000 in hand applicable to a dividend, we declared a dividend and we had the money to pay it, we had created shares for the purpose of defraying some expenses properly payable out of capital—money to meet those expenses was wanted immediately—and as it would take some months to get in the calls, we paid those expenses by means of the £200,000 that we had in hand, and as to which we had declared a dividend —we thus, in fact, borrowed the dividend from the shareholders and applied it to capital purposes, and we now propose to issue the shares and get the calls paid upon them to repay the money we have borrowed from the dividend funds." I express no opinion what would have been the effect even of such a state of circumstances as that. There would in that case have been a violation of

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the letter of the 99th section, but not of its spirit. There is, however, no pretence for saying that any such case as that is alleged. What the directors do allege is this: that in the course of the current half-year in which the profits were being made, and while they were being made, they spent some of what they call their revenue in satisfying capital purposes, and then when they came at the end of the half-year to declare the dividend, they proposed to ascertain the profit without deducting that money which, during the currency of the half-year they had expended for capital purposes. That is a very different question; and even if the case had been, that, as to the shares they were about to issue, they proposed to have the calls paid by the public to whom they were to be issued, and to appropriate the money to make good the sums which they had expended for capital purposes during the currency of the half year, I should very much doubt whether that would have been a lawful appropriation of the money raised by the shares. But they do not propose to sell the shares, they propose instead to offer the option of these shares to the shareholders, who, it is said, are entitled to a dividend, and to let them take these shares at par if they think fit so to do, and leave the other shareholders to wait the opportunity of being able to settle their claims. That is the only explanation that is put upon the bill, or in the affidavits. I give no opinion upon the question whether the shares could be issued to be sold at a discount; but, supposing they could, this further question arises, whether the company, instead of selling the shares and dividing the money rateably among the shareholders towards payment of their dividends, could offer the shares to those shareholders who liked to take them at their full nominal amount in satisfaction of their dividends. I am of opinion that such a proceeding was illegal, and not an arrangement as to which the majority could bind the minority. Again, according to sections 47 to 51 of the *Vale of Neath Act*, the balance which is net profit having been ascertained, is to be apportioned between the four several sections of shareholders; the deductions to be made from the shares of each are then to be ascertained, and the ultimate balance due in respect of each section of the shares is to be ascertained, apportioned, and paid to the proprietors rateably according to their several rights. Now has there been any such

appropriation, apportionment, and payment of the net profits? It is worthy of consideration whether there could be any such appropriation, apportionment, or payment, except of money actually in hand. Nothing is said in the Act about a dividend being declared, but the net fund is to be appropriated and apportioned, which is exactly equivalent to declaring a dividend. Was it intended by the Act that there should be an appropriation or apportionment of imaginary sums of money which only appear in an account, and are not actually in hand, whatever may be the circumstances which have led to the money in hand being other than the money appearing in the balance of the account? I do not think it necessary to express any opinion upon that, beyond saying that the point is doubtful, and if it could not be done the whole proceeding is wrong. But however this may be, I think that under a direction to apportion, appropriate, and pay the net revenues amongst all the shareholders rateably, the offering to the shareholders in lieu of the dividend shares which some shareholders will take and others will not take, is entirely beyond the power of the company; and that any one who declines to accept them may say, "This is not payment within the meaning of the Act; you are not proposing to pay anybody; you are, indeed, proposing to give a thing that may be sold in the market, but you are not proposing to give that which we are bound to take, you give us an option to take it, to some of us it may be beneficial to accept the option, to others it may not be so; the offering such an option is not a payment of the apportioned share of net profits, and is beyond your power—we decline to accept it, and we ask the Court to interfere to prevent its being offered to others."

It appears to me upon the merits that the order overruling the demurrer, and the order granting an injunction, are quite right.

I do not think it necessary to enter at length into the question of parties: if the act complained of is illegal, as I think it is, I do not at present see why any single shareholder should not be at liberty to file a bill to restrain the company from exceeding their powers. The cases in which it is necessary to make other shareholders parties are cases in which one class of shareholders has an interest distinct from and opposed to that of another class of shareholders; but if one individual having an interest complains of an

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act of the whole company, or the executive of the whole company, as being illegal, there is, as a general rule, no necessity for any other shareholders being present. Here, the only persons who can have any distinct interest are those shareholders who have accepted the option of taking shares in payment of their dividend—possibly they may stand in a distinct position from the shareholders at large; but the 22nd section of the bill alleges that Mr. *Bassett* represents that class, and I think he does sufficiently represent it. The objection for want of parties, therefore, has no foundation, and upon the whole I am of opinion that the order of the Vice-Chancellor is right in both cases, and that the appeals must be dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Singleton & Tattershall.*
Solicitors for the Defendants: Messrs. *Young, Maples, & Co.*

L. J. C. 1868 Jan. 11, 13, 28.

In re CAMBRIAN RAILWAYS COMPANY'S SCHEME.

Railway Companies Act, 1867 (30 & 31 *Vict. c.* 127), *ss.* 7, 9, 18, 23—*Scheme of Arrangement, on whom binding—Restraining Actions by Creditors and Landowners.*

A scheme of arrangement under the *Railway Companies Act*, 1867, is not, by sect. 18 of the Act, made binding upon unpaid landowners or general creditors of the company, but only on persons who have assented thereto, or are members of classes which, under the previous sections of the Act, have become bound by the assent of the requisite majorities.

The Court has, however, jurisdiction, under sects. 7 and 9 of the Act, to restrain proceedings by creditors or unpaid landowners during the maturing of the scheme.

This jurisdiction, as regards landowners, is not taken away by the provision in sect. 23 of the Act, that nothing "hereinbefore contained" shall affect the claims of landowners, the word "hereinbefore" being, upon the true construction of the clause, not referable to all the preceding sections of the Act, but only to the preceding part of the same section.

The Court will not restrain proceedings by a creditor or unpaid landowner, unless the scheme makes reasonable provision for the payment of the claims of creditors and landowners.

Order of *Wood*, V.C., affirmed with variations.

THIS was a motion by the *Cambrian Railways Company* by way of appeal from an order of Vice-Chancellor *Wood*, refusing to re-

strain proceedings by landowners against the company, after the filing of a scheme under the *Railway Companies Act*, 1867.

The company, on the 30th of October, 1867, filed a scheme of arrangement with its creditors under the above Act. The only provisions contained in the scheme which need be noticed were the 3rd, 5th, and 7th articles.

"Article 3. The capital sums of the mortgages in Class A. in the schedule shall be payable on the 1st of January, 1873, and not before."

"Article 5. The company shall be at liberty to exercise the powers conferred by any Acts of the *Inland Coast* or *Cambrian Companies* for raising money by mortgage to the extent of the money which remains unraised under the same Acts respectively, and all the mortgages granted shall comprise and be charges on all the railways, undertakings, and property of the company, whether *Inland Coast* or general, and shall bear the interest in the mortgages respectively mentioned, and as to priority rank *pari passu* amongst themselves and equally with the mortgages comprised in Class A. in the schedule."

"Article 7. The company shall forthwith complete all contracts with landowners uncompleted, and settle all other debts and liabilities owing from the company, other than those comprised in the schedule, by granting to the landowners and creditors for the amount of the capital, purchase-moneys, and sums owing to them, together with their interest and costs respectively, if any, rent-charges, mortgages, or debenture stock, to be dealt with as if they had been rent-charges, mortgages, or debenture stock in Class A. of this scheme, and to be subject to the provisions of Article 5 of this scheme, and all actions and suits brought or instituted by any such landowners or creditors against the company shall be stayed: and no actions or suits shall be brought or instituted against the company by any such landowners or creditors, except for non-performance of obligations under or within this scheme."

Various actions brought against the company by simple contract creditors were at this time pending. There were also pending suits and actions by landowners who had sold land to the company, and not having been paid had taken proceedings against the com-

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pany to recover the purchase-money and to enforce such liens against the lands as they might respectively be entitled to. Suits in equity by debenture holders were also pending. Summonses were issued from the Chambers of Vice-Chancellor *Wood* to stay all these different proceedings and were adjourned into Court.

On the 10th of December, the Vice-Chancellor, at the conclusion of the arguments, gave judgment as regarded the actions and suits by simple contract creditors and debenture holders, holding that those in which there was any question to be tried ought to be allowed to go on to trial, execution being stayed; and that in the others, to which the company admitted that they had no defence, proceedings ought to be stayed on the company giving judgment to be dealt with as the Court should direct. His Honour expressed his opinion to be, that all creditors would, under the provisions of the Act, be bound by the scheme when confirmed (1), unless, as regarded landowners, the case was altered

(1) 1867. Dec. 10. SIR W. PAGE WOOD, V.C.:—

There are some parts of the case which I may dispose of at once, reserving for a little more consideration the question about the landowners. It is unfortunate, this being the first scheme of the kind brought forward under the new Act, that it should have been thought necessary to summon here all the parties who are bringing actions. Having regard to sect. 9, it appears to me to be clear that it is desirable in future when there is really no defence to an action, and when the company cannot be fairly accused of shewing partiality to a given creditor, that judgment should simply be given in all such cases where the company is in the unfortunate position of the present company, and that reliance should be placed on sect. 9, viz., "No execution, attachment, or other process against the proprietors of the company shall be available without leave of the Court" (explained by the interpretation clause to mean always the Court of Chancery) "to be obtained on summons or motion in a summary way." The natural course, therefore, would be, to let them all have their judgments, and if any should venture upon proceeding against the positive direction contained in sect. 9, although, of course, there cannot be a parliamentary injunction, yet the Court would know how to deal with the costs and otherwise, incurred by any persons who, having notice of the scheme by the advertisement in the *Gazette*, should nevertheless venture to take proceedings. The costs would be dealt with, I apprehend, just as they are in administration suits, where any step taken by a creditor after notice of a decree is taken at his peril, and he has to pay the costs of any application to stop it. So far a great deal of the expense which has been incurred on the present occasion by bringing here everybody who is a creditor would be swept away. The other cases, in which there really is a matter to be tried, might also be safely left to proceed to trial. There might be a third class of cases, raising some special ground, which it

by the 23rd section, which might be held to take them altogether out of the Act. On this question His Honour reserved judgment, and on the 17th of December decided (1) that the con-

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is not necessary to speculate upon, in which it would be desirable to apply to the Court for an injunction to stay any further proceedings. That would materially reduce the expense of an application under the Act. If the application were only made with reference to cases where there was, on the one hand, a special reason for not admitting the debt and not giving judgment, and on the other hand, for not going to trial, the cases would be extremely few.

As regards the position of the different creditors, it appears to me there is a scheme laid down by the Act which, in some degree, bears out a portion of the contest of the landowners, viz., that the Legislature, in dealing with the company and their creditors, was desirous of having some sort of process (exceedingly difficult I fear to effectuate) like bankruptcy without a *cessio bonorum*, and without a stoppage of the trade. That is the problem which the Legislature evidently wished to be solved, and it is, no doubt, a problem of extreme difficulty. It was wished to continue the carrying trade, and at the same time to do justice to the creditors, and therefore a plan has been devised for doing justice to the creditors and carrying on the business for the benefit of the public in the shape of traffic on the railway.

The arrangement follows in a great degree the course of identifying the railway company and their shareholders, the debenture holders and mortgagees, all holding charges upon what is called in the Act of Parliament "the undertaking," as forming one common class having an interest in the undertaking,

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(1) Dec. 17, SIR W. PAGE WOOD, V.C.:— (12 W.R. 305)

The point remaining to be considered is, whether the case of landowners proceeding in respect of purchase-money due to them, or of persons injuriously affected by the railway, and entitled to claim compensation under sect. 68 of the *Lands Clauses Act*, was included in the class of creditors whose proceedings may be stayed on the filing of a scheme under this Act (30 & 31 Vict. c. 127).

With respect to persons injuriously affected, I have none of that class before me. But there are vendors of land to the company who have not had their claims in respect of purchase-money satisfied, some of whom have taken proceedings in this Court which are now pending, but have not obtained, and will not obtain, judgment at law. The questions are:—(1), whether they are restrained by the filing and publication of the scheme, pursuant to sect. 9, from taking out execution without leave of the Court; and (2) whether they ought to be restrained, under s. 7, upon application made to the Court.

As to all the other classes of creditors who are clearly within the purview of the Act, I arranged that where there was no defence judgment should be given, but that where a defence could be shewn by the company the action should proceed, in order that the right might be tried, but that execution should be stayed; and it was also settled that all parties who had been served should have their costs of the application.

The clause under which landowners

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cluding part of the 23rd section took away all jurisdiction under the Act in respect of the claims of landowners. His Honour accordingly refused to interfere to stay their actions and suits,

in contradistinction to the outside creditors who have no special interest in the undertaking.

These outside creditors may be divided into two classes; first, those who have become creditors either in respect of some damage or tort from being injuriously affected by the railway, or from some accident for which they claim compensation, or who may have supplied goods to the railway, but have taken no charge upon the undertaking and have no special interest in it. The other class of outside creditors consists of landowners whose land is taken, and with whom contracts are entered into to obtain possession of the land before the undertaking is set afloat, and who, again, have no interest in the undertaking itself when formed.

The first clause, which would embrace every description both of inside and outside creditors, is sect. 6. I pass over sect. 4 at present, for it is not material for the object I have in view to pause upon it. Sect. 6 is:—"Where a company are unable to meet their engagements with their creditors the directors may prepare a scheme of arrangement between the company and their creditors with or without provisions for settling and defining any rights of shareholders as among themselves——"

Pausing there for a moment, it appears clear to me that that does not give any power to the company by their scheme to deal with priorities or rights of their creditors. The rights of the creditors must be taken as they are, whatever their legal rights may be; but there does appear to be a provision

claim to be exempted from the operation of the preceding clauses of the Act, is sect. 23. It follows a vast variety of sections with reference to dealing with creditors, and it seems, in truth, to be the last clause with reference to the particular provisions as to creditors under the arrangements made for satisfying their debts as well as they can be satisfied. Provision is made in the Act as to whether creditors shall be allowed to sue. There are provisions made for appointing a receiver under sect. 4, rather than allowing all the goods of the railway to be seized. Provision is also made through the medium of the scheme for payment of creditors according to their priorities. Then sect. 23 makes provision with regard to priorities of creditors, and seems to terminate that portion of the Act which relates to the satisfaction of creditors of the company: the other sections which follow relating to the issue of debenture stock and restrictions on the rate of interest, but not to the settlement or satisfaction of creditors' debts. Looking at sect. 23, and first considering its natural construction, it provides that all money borrowed on mortgage, bond, or debenture, shall take priority over other debts or engagements contracted after the passing of this Act. Pausing there, I ought to say that the existing state of the law was well known. The decisions in the case of the *London, Chatham and Dover Railway Company* (*Gardner* v. *London, Chatham and Dover Railway Company*, Law Rep. 2 Ch. 201) have settled that holders of debenture stock have only a charge upon the undertaking, or share in the profits of the

his order, as drawn up, being prefaced with a statement of opinion that the creditors to whom moneys were due in respect of the purchase of land were, by the 23rd section of the Act,

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for settling and defining the rights of the shareholders of the company as among themselves, and as at present advised it does not seem to me that it points to handing that over to some other authority or power. It strikes me at present as rather a refinement on the language to construe it as Mr. *Giffard* would have me construe it, viz., that it should be a provision enabling some third party or arbitrator to settle and define; but the provision for settlement seems to me to be nothing more than a provision the object of which shall be a settlement. The section goes on to say that they may file the scheme in the Court of Chancery, and (sect. 10), the scheme shall be deemed to be assented to by the holders of mortgages or bonds issued under the authority of the company's special Acts, when it is assented to in writing by three-fourths in value of the holders of such mortgages or bonds. Sect. 11 provides, in the case of persons having a rent-charge payable in respect of the purchase of the undertaking of another company, that the scheme shall be deemed to be assented to by them when assented to by three-fourths of such holders. And so on with a number of classes, such as guaranteed, preference, or ordinary shareholders, all concerned in or interested in the general undertaking; a different set of arrangements being provided where the company are lessees of another railway. Then sect. 15 goes on to say: "Provided that the assent to the scheme of any class of holders of mortgages, bonds, or debenture stock, or of any class of holders of a rent-charge or other payments as

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adventure, but no specific charge upon the property of the railway itself, and consequently those simple contract creditors who obtained payment, obtained in that manner a species of priority over persons who were mortgagees of the undertaking. It is here enacted that there shall be no priority on account of any debts or engagements entered into after the passing of the Act in respect of those debts, but, on the contrary, that they shall be postponed to mortgage debts. Then follows a proviso that this priority shall not affect any claim against the company in respect of any rent-charge under the *Lands Clauses Act*, or in respect of any rent or sum reserved by or payable under any lease granted or made to the company by any person in pursuance of any Act relating to the company, which is entitled to rank in priority, or *pari passu*, with the interest or dividends on the mortgage bonds and debenture stock. Then follow these words:—"Nor shall anything hereinbefore contained affect any claim for land taken, used, or occupied by the company for the purposes of the railway, or injuriously affected by the construction thereof, or the exercise of any powers conferred on the company."

Now, the change that takes place in this last portion of the section is very remarkable. After providing that all money borrowed shall have priority over other debts, with a proviso exempting from that priority certain specific claims —rent-charges in respect of land and rent-charges in respect of leases of the railway—instead of going on to say (which would have been the reasonable

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exempted from the operation of all the preceding sections of the Act.

The company appealed from this decision as to the proceedings by landowners.

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aforesaid, or of any class of guaranteed or preference shareholders, or of a leasing company, shall not be requisite in case the scheme does not prejudicially affect any right or interest of such class or company."

It is rather curious, and it shews some degree of haste in the framing of the Act, that there is no clause that I can find saying that these assents are required, except by inference, when it says the assents shall be deemed to be given, and then, that no other consent shall be required; upon which one is inferentially led to suppose that all the consents previously spoken of are required. It is hastily framed, but the meaning of the Legislature is clear by inference. The question, then, is, whether or not the general creditors, that is, the outside creditors, which would include landowners (but for sect. 23), and all whose property is injuriously affected, and all simple contract creditors, are meant to be bound by the scheme. But for sect. 23 I should be clearly of opinion that all were meant to be bound. As to the simple contract creditors, they are the very persons who must be provided for in that scheme, as it is a plan by which they are to be paid; but how would it be possible within three months to get the assent of the fluctuating three-fourths of the people who are supplying articles that may be required day by day for the daily proceedings of the company. It would be impossible to get at them, and therefore there is no provision requiring the assent by three-fourths of them. Be-

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phraseology if the construction was to be that this claim for land taken was to be exactly in the same condition as and no other than a claim for a rent-charge granted in pursuance of the *Lands Clauses Act*), "nor any claim for land taken, &c," there is this total change of language, "Nor shall anything hereinbefore contained affect any claim for land, &c." It appears to me that the natural construction of this, irrespective at present of any consideration which may arise from the general purport of the Act (which is of course the main point to be considered), and standing upon the mere language, would be that "nothing hereinbefore contained" was referable to the whole Act and not simply to the particular clause. In construing an Act of Parliament, as in a deed, you do not divide it into sections; and as in a covenant in a deed with similar words that "nothing hereinbefore contained, &c.," "hereinbefore" would relate back to all that preceded unless it were clearly and manifestly a part of the simple proviso in the previous part of the covenant, so here in an Act of Parliament the "hereinbefore" must run back to the whole of that which is contained in the previous part of the instrument. Further than this, no effect whatever is given to any change of the phraseology if it is construed as "nothing *in this section* contained," as the previous part of the section relates to priority and priority only. Nothing would have been more simple than to say, as had been said in the previous part:—"This priority shall not affect a rent-charge, nor any claim for land in any shape whatever, nor any land in-

Mr. *G. M. Giffard*, Q.C., and Mr. *W. W. Mackeson*, for the company:—

Under sects. 7 and 9 the Court clearly has jurisdiction to make the order asked for, unless sect. 23 excludes the jurisdiction. The

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sides this, as they are placed below the other classes in sect. 23 (I am not now speaking of the landowners) their consent to the scheme becomes of less importance. They are put last, but they will have a right to be heard, and this will explain the meaning of sect. 17.

All these mortgagees have a right, apparently, by sect. 23 to be paid in priority to the simple contract creditors (after the passing of the Act) but the Court would not allow them to frame some ingenious scheme by which the railway might be so conducted as that there would be sufficient to pay the mortgagees and other favoured creditors without leaving anything for the rest. Therefore the simple contract creditors are to be heard, and the Court will see whether it is a fair scheme. Accordingly, having provided for all these consents, it says that at any time within three months after the filing of the scheme the directors may apply to the Court, by Petition in a summary way, for confirmation of the scheme. It may be of some use to inform those who are interested in these matters, that the present scheme of orders provides that, at least a fortnight before the coming on of the Petition, there shall be notice given of the presentation of the Petition, so that they may be prepared in good time to present their Petitions. That will be part of the regulations. Then follows sect. 17:—

"After hearing the directors and any creditors, shareholders, or other parties whom the Court thinks entitled to be

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juriously affected." But the phraseology is wholly changed, and the question of priority is no longer put forward as that which is to be excepted with regard to particular specified objects, but what is said is, "that nothing hereinbefore contained shall affect any claim for land."

It was said, however, that it would have been much more simple to have said "nothing in this Act contained." But the expression "hereinbefore contained" is correct in that respect, as there are subsequent clauses which relate in many instances to land taken for the railway, damage to owners, compensation, &c. It would not do, therefore, to say that "nothing in this Act" contained shall extend to any land purchased by a railway company while "nothing hereinbefore contained" extends to all the previous clauses for making arrangements for payment of the debts of the company.

However, after coming to this conclusion upon the purview of the clause as it stands, I thought it right to have regard to the general principles of construction. As in every other instrument, the true principle will be to look not only at the words of the instrument, but at all the surrounding circumstances. Nothing upon this point can be more valuable than the elaborate and most careful judgment of Lord Justice *Turner* in *Hawkins* v. *Gathercole* (6 D. M. & G. 1, where he entered fully into the mode in which the Court has been in the habit of considering Acts of Parliament by giving more or less efficacy to the words employed with reference to surrounding circumstances, in some cases

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whole question turns on the meaning of the word "hereinbefore"—whether it means "in the previous part of this Act" or "in the previous part of this section." We contend that the expression

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heard on the application, the Court, if satisfied that the scheme has been within three months after the filing of it, or such extended time (if any) as the Court has allowed, assented to as required by this Act, and that no sufficient objection to the scheme has been established, may confirm the scheme." Sect. 18. "The scheme, when confirmed, is to be enrolled in the Court of Chancery, and thenceforth the same shall be binding and effectual to all intents, and the provisions thereof shall, against and in favour of the company and all parties assenting thereto or bound thereby, have the like effect as if they had been enacted by Parliament." It appears to me, therefore, to be plain as regards simple contract creditors, that they will come in under the term "creditors;" and if there are any other persons (and there may be) interested who may have something to say upon the subject of the Petition, they will be heard, and it is not until after hearing them that the Court will confirm the scheme; and as there is no 23rd clause applicable to the simple contract creditors, it is as plain as possible that they are within all the previous provisions of the Act, and must be dealt with according to those provisions, having only such rights as existing creditors as sect. 4 gives them. By the 4th section all simple contract creditors who have entered into contracts before the passing of the Act (and all who enter into contracts after the passing of the Act enter into them at their own peril) are at liberty to proceed, just as they could proceed before, by action, because if an action

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making large exemptions from what appear to be general words, in some cases on what appeared to be restrictive words, introducing a much larger operation than the words themselves carry, having regard to the whole position in which the subject matter of legislation stood at the time of the enactment. On this principle the case becomes a good deal stronger for the landowner. These words, which in their natural and simple sense appear to me to have that effect, seem to have that effect especially when one looks at the whole scheme and purview of the Act—the purview of those who had the framing of the Act—having regard to the very different position of a landowner from all the other creditors—perhaps so much may not be said as to persons injuriously affected, though I think as to them that a portion of the reasoning would apply. As to landowners there is no recital, but we must take judicial notice of the known state of judicial proceedings anterior to the passing of the Act; and we know that there had been decisions (of which we must assume the Legislature to have been informed) by which the Courts had struggled to prevent the tearing to pieces of an undertaking like a railway, formed in a great measure for the public benefit as well as private profit, by the numerous creditors swooping down and seizing, under judgments, the chattels by which alone locomotion could for the time be carried on, and substituting a sort of general scramble and rush for a system of equal administration among all those who may stand *pari passu*. That being the case, and

may just as well mean one as the other, and that its meaning is to be determined by the context. The 23rd section is a new clause, beginning a fresh division of the Act under a fresh heading,

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is brought in respect of any matter of contract, although the action is commenced after the passing of the Act, still, if the contract is before the Act, it is plain the action may be brought. If it is not upon contract, the action cannot be brought. If it is for a tort, or for damage, or for injuriously affecting, that could not be brought after the passing of the Act, although the damage might have been done before it. Therefore, so far, I have arrived at a satisfactory conclusion to my own mind upon the purview of the Act, and as to what ought to be done on the application before me as regards the question of the simple contract creditors. The only doubt I can have as to what ought to be done at this moment is, that it appears to me very improbable that the present scheme, in its actually existing shape, will be carried out. I have no doubt as to the scheme being *bonâ fide*. If it is a *bonâ fide* scheme I do not think that I ought to allow that mischief to take place which the Act was intended to prevent, namely, the tearing to pieces the whole property of the railway by allowing executions to issue upon every judgment that may be recovered in a race between all the creditors, while no one obtains that which is strictly just, and which the Legislature requires as being strictly just, namely, equal distribution among those who are, I suppose I may say, in *pari materiâ*, standing in exactly the same position as regards the class of debt which they are seeking to enforce. It is not right that they should be allowed to tear the estate to pieces, and therefore I do not hesitate, upon this

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the condition of the debenture holders also having been ascertained to be very different from what they themselves anticipated when they took their charge upon the undertaking, the purview of the earlier sections, down to sect. 23, was this: Sect. 4 prevented for the future (and it did not touch any contract standing at the time of passing the Act as regards matters of contract) any simple contract creditor from taking the chattels of the railway by means of execution. Further than that, railway companies were authorized to make a scheme by which, when they are not able at once to pay all their debts, they should endeavour to make provision for due payment, In order to secure a reasonable amount of justice in such scheme, the consent of a large majority of the shareholders, and of the same majority of the creditors by debenture bond or mortgage, was required. For the reasons I assigned the other day, it seems to have struck the Legislature that there would be a difficulty in obtaining the consent of simple contract creditors, and that difficulty was of less consequence, as the purview of the Act placed them after everybody else, except, of course, the shareholders. That being so, provision is made that all persons *pari passu* should, according to their several priorities, have justice administered to them; some of the priorities being created by the Act, and others existing anterior to it. An equable division amongst all creditors *pari passu* being the principal object of the Act, this scheme is framed. It may then well have occurred to the Legislature that there was a class of

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the heading being part of the Act when passed. The former division winds up with the power of the Court of Chancery to make rules as to schemes, and the Court is never again mentioned

scheme as framed, to say that they should all be allowed to proceed to judgment only. Where there is any question to be tried, that question will be tried, and if there is nothing to try, judgment will be given. Those I should stay at once, as the matter is before me. Indeed I think they are stayed already by parliamentary enactment, and the enactment, curiously enough, says nothing about the scheme, although I take it that the Court would have ample jurisdiction on application, even under the 9th section, to say that if the scheme were a bubble altogether this Court would not be ancillary to carrying the 9th section into effect. But the Act says nothing beyond this, that the scheme is to be filed, and that is at once a stay of execution. I conceive that there is sufficient *bona fides* in the scheme to say that I ought to make an order in all these cases (except the landowners' cases, which I shall deal with separately) for staying the execution, attachment, or other proceedings against the property of the company until further order, without the leave of the Court.

I ought to mention on this part of the case, that although I doubt whether this scheme can be effectually carried out, yet I confess I have not such very great doubt about the power of filing an amended scheme in this shape. I think that the form of the legislation obliges one to have recourse to a clumsy mode of doing it, but I think, nevertheless, that clumsy mode is allowable under the Act, and is obviously carrying into effect the spirit of the Act. The scheme must be adver-

persons, the landowners, who are in a totally different position from any other creditors. In the first place (and this applies equally to persons injuriously affected) they become creditors of the company before the undertaking can be at all set afloat. The land must be taken, and there must be compensation to persons injuriously affected in order that the scheme may be properly set afloat, and the creditors may have the benefit of this railway. Justice must be done by paying everybody injured by the creation of the property on which you, the creditors, now wish to have your security. Apparently, therefore, there might be a reason on that ground for putting persons injuriously affected into the same position as landowners. But further, as to landowners, there is this remarkable difference, that they had a specific charge, which nobody else had. All the creditors, according to their respective positions, may come *pari passu* upon the whole mass of the railway property, and the other creditors, though by simple contract, may on obtaining judgment, or a receiver under sect. 4, come also upon the property, but all are exactly in the same position. Whereas every landowner has a charge upon a certain piece and portion of the railway, totally different from all the other charges, and coming in in the nature of a general creditor, although besides being a general creditor he has that specific charge also. Then as to the position of the law. There are a series of decisions in 1866, the year before the passing of the Act. In *Cosens* v. *Bognor Railway Company* (Law Rep. 1 Ch. 594), a de-

in the Act. The 23rd section relates to a subject wholly unconnected with those of the former part of the Act. Its object is to provide how borrowed money is to rank as to priority. Sects.

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tised. It must be dealt with within three months after the filing, or such extended time as the Court shall direct. It may be dealt with as speedily as you please. When the thing is ventilated as a *bonâ fide* scheme (always assuming that it is not a mere pretence to escape from actions), if it is found that three fourths of these various classes which are here described would be desirous and willing to come into the scheme with a certain degree of modification, it appears to me that there might be very easily an application to the Court for leave to file a new scheme superseding the first scheme altogether, so that the new scheme would become subject to such directions as the Court might think proper to give, and then the Court would probably take care that the new scheme should be carried into effect within three months from the filing of the first scheme, so that the three months should never be exceeded.

Mr. *James*:—The Court may extend the time as it thinks fit. The words are "or such extended time as the Court may think fit."

The VICE-CHANCELLOR:—I must suppose that the Court would be evidently anxious not to extend the time beyond the three months, because that is the scheme of the Legislature, that it shall not be extended unless some good reason is given. In truth, you can hardly conceive extended time to be granted except with the view of some alteration or improvement, which seems to be the very object of placing these words in. I think it might be

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cree of Vice-Chancellor *Stuart* restraining the railway company from running any engine over, or otherwise using the Plaintiff's land, until the balance of the purchase-money should have been paid, was not reversed, as the Lords Justices differed in opinion, Lord Justice *Turner* being adverse to the view taken by Vice-Chancellor *Stuart*, while Lord Justice *Knight Bruce* concurred in it.

In *Walker* v. *Ware, Hadham, and Buntingford Railway Company* (Law Rep. 1 Eq. 195), the Master of the Rolls held that the owner of land taken by a railway company had a lien on the land for the purchase and compensation money, and was entitled to an account of what was due, and in default of payment to a sale of the land.

In *Pell* v. *Northampton and Banbury Railway Company* (Law Rep. 2 Ch. 100), an appeal was brought from a refusal by the Master of the Rolls to grant an injunction restraining the company from continuing in possession or using Plaintiff's land until they had paid the purchase-money; and the order of the Master of the Rolls was affirmed, so that the weight of authority may be considered to be balanced; although I find nothing whatever anterior to the passing of the Act that had affected to deal with the direction for sale contained in the decree of the Master of the Rolls in *Walker* v. *Ware, Hadham, and Buntingford Railway Company* in reference to the purchaser's lien.

The case of *Raphael* v. *Thames Valley Railway Company* (Law Rep. 2 Ch. 147), has some bearing upon the subject, as shewing that the mere incon-

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23—26 evidently form a set of enactments by themselves. The section first speaks of "*a* company" borrowing money, and then throughout uses the expression "*the* company." This shews that

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altered in that way. I am obliged to mention it now, otherwise it would not be just in me to make any order at all on the scheme, which, as it stands, is not likely to be carried into effect.

With regard to one point which has been mentioned, I think it has been the opinion of others in framing orders (and it is my own opinion, subject, of course, to correction) that doubt cannot be entertained that when there is a reference to the Court of Chancery, it must be subject to all the procedure of the Court of Chancery, and that procedure includes appeal. It is said that when enrolled the scheme shall have the force of an Act of Parliament. Accordingly provision is made giving a time within which it shall be enrolled, and not before, it keeps the enrolling for the express purpose of giving an opportunity of re-hearing, and dealing with the thing as the Court of Chancery deals with all matters which are brought before it.

Everything which is brought before the Court of Chancery is subject to appeal, unless the contrary is said, and therefore, that being the course of the Court, the *cursus curiæ* will be followed in all cases; and I cannot conceive there will be any difficulty in that respect. The only remaining question is as to the landowners, upon which I reserve my judgment.

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venience to the public by the interference with the traffic will not be a sufficient defence by a company against the performance of contracts undertaken by them. The Lord Chancellor, reversing the decision of the Master of the Rolls, made a decree for specific performance by the company of their agreement to execute a certain road and approach in a particular manner, notwithstanding it was averred, and to a certain extent proved, that it would involve an alteration of the line of railway and stoppage of the traffic for some time, though for how long does not distinctly appear. The Lord Chancellor says certainly that the stoppage of the railway is not to be raised as an objection to the performance of the agreement, as it might have been expected that the company would have suspended their operations until the question could be determined; and if they had done so, the only inconvenience to the public would have been, that the opening of the railway would have been delayed.

I think in that state of the authorities it is impossible to say that the Legislature would not have the fact before it of the landowners being in a different position from that of any other persons. And, therefore, it might reasonably be said—although we are going to stop other creditors—although we are going to adjust the priorities between the debenture creditors and other creditors, we put altogether in a separate category the landowner: he is not to be stopped, either in the one way or the other; he has his own particular rights; the railway could never have come into existence without taking his land; he has got his remedy against that particular portion of land; and further than that (which is of some consequence) his consent and approbation of the scheme are

a company borrowing money is spoken of, not a company filing a scheme. The inconvenience of the Vice-Chancellor's construction is enormous. If it be correct, sect. 4 does not apply to a land-

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nowise provided for by the Act. I gave reasons, which appeared to me to be sufficient, why the general creditors should not be so touched. First, the difficulty of discovering them; and secondly, the fact of their being postponed to everybody else. But neither of those reasons applied to a landowner. A landowner has rather a priority to everybody else. And further, a landowner whose land is not paid for could be easily ascertained at all times. Some provision, therefore, would be expected for the assent of landowners before they could be bound; and it appears to me, upon the sound construction of the Act, that a landowner was intended to be exempted from all that previous part of the Act, and therefore I cannot make any order affecting him under the 7th section of the Act. Nor can I hold that, under the 9th section, he is stopped in his action (as is the case of one landowner in the present case) from obtaining execution. It had not escaped my attention, and therefore I mention it, that it may seem strange to say that you give him a very valuable priority, stopping everybody else, under the 4th clause, and leaving him to go on, because you might give him the opportunity of seizing chattels which no one else could do. But I am not by any means clear that that would be an answer to the case, for the reasons I have given. It appears to me that the Legislature were desirous of securing him in that position, and placing him in a better position to everybody else. I think, therefore, upon the whole, the order must not extend in any way to the suit or action of any landowner.

MINUTES OF ORDER:—The Court being of opinion that the creditors to whom moneys are now due in respect of the purchase of land are, by sect. 23 of the Act, exempted from the operation of all the preceding part of the said Act, doth not think fit to make any order with reference to any action or suits by such creditors, except as to the payment of costs as hereinafter directed. Taxation of costs of motions and summons. Company ordered to pay costs when taxed, and ordered that such costs be accordingly paid by the receiver in *Robinson* v. *Cambrian Railway Company*, out of the property, tolls, and revenue of the company.

Taxation of costs of Plaintiffs in all suits and actions stayed by this order as hereinafter directed, being the actions and suits mentioned in the 3rd schedule [actions and suits by debenture holders in which agreements have not been entered into, and in which there is no question to be tried] up to and inclusive of judgment on decree. Liberty to apply for payment of such costs in *Robinson* v. *Cambrian Railway Company*.

Continue proceedings under the decree in *Robinson* v. *Cambrian Railway Company*.

Plaintiffs in 3rd schedule restrained from taking any further proceedings, except for purpose of obtaining judgments or decrees, until further order.

Judgments and decrees to be given by company for the amounts that shall appear to be due to several Plaintiffs in all actions (excluding landowners) in which there is no question to be tried.

Plaintiffs in 3rd and 4th schedules at liberty to go in and prove their respective debts in *Robinson's* suit.

Plaintiffs in 4th schedule (judgments

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owner; he, therefore, may seize the rolling stock, and so stop the railway, but he cannot get a receiver and manager. *Doe* v. *Leeds and Bradford Railway Company* (1) shews in what an awkward position a landowner will be if excluded from the Act. There is no reason why he should be placed in a materially different position from other creditors, and a construction having that effect should not be adopted without necessity.

[The Lord Justice Lord Cairns:—Suppose you satisfy me that the Court has jurisdiction to stay the proceedings, still the case may not be one in which it ought to do so.]

In that case the expression of opinion must be struck out, and the main object of our appeal would be answered. It is of no use our thinking of filing a better scheme if there is no jurisdiction to restrain the landowners.

Mr. *Willcock*, Q.C., and Mr. *Cookson*, for *Davis* and *Price*, who had filed a bill for specific performance against the company; Mr. *Cotton*, Q.C., and Mr. *W. Pearson*, for parties similarly circumstanced; Mr. *Archibald Smith*, for the Plaintiffs in two similar suits of *Pryse* v. *The Cambrian Railways Company* and *Lewes* v. *The Cambrian Railways Company*; Mr. *W. W. Cooper*, Mr. *O. Morgan*, Mr. *A. G. Langley*, and Mr. *John Edwards*, for other landowners who had instituted proceedings against the company:—

The scheme of the Act is to bind certain specified classes of persons who have a specific interest in the profits of the concern, but not to bind outside creditors or landowners. The language of sect. 18 shews that the scheme is not to bind all the world, like an Act of Parliament, and there is nothing in that section to make the scheme bind anybody as against whom a binding effect has not been given to it by the previous sections. *Primâ facie*, therefore, landowners and simple contract creditors are out of the Act. Sections 7 and 9 would, however, give the Court a certain power over them, and the question is, whether the 23rd section

already obtained) and also Plaintiffs in 3rd schedule (where judgments are to be given) restrained from issuing execution, attachment, or other process under such judgments and decrees against property of company until further order. Liberty to apply.

(1) 15 Jur. 946.

does not prevent this as regards landowners. We contend that the Vice-Chancellor has construed this section rightly. If the object of the Legislature was such as is contended by the Appellants the words "shall anything hereinbefore contained" are superfluous and might have been omitted, or else the clause ought to have run "nor shall this priority," for there is nothing else previously mentioned in the section.

[The LORD JUSTICE LORD CAIRNS:—Your argument puts the owner of a rent-charge on a different footing from a person who has sold for a gross sum.]

That might well be so, for a rent-charge of the nature here referred to is a charge on the profits. Sect. 23 and the following sections are not wholly unconnected with what goes before, since a scheme, by sect. 6, may contain provisions for raising additional share or loan capital. The divisions of the Act cannot be read separately like those of the *Lands Clauses Act*, which are divided by separate words of enactment. We contend, therefore, that there is no jurisdiction to restrain the suits of the landowners. But if there be such jurisdiction it ought not to be exercised unless the scheme provides funds to pay us. If it did, the Court might reasonably stay our proceedings, but what is proposed is only to give us debentures, not payable till five years hence. Landowners are a recognised and known body of creditors, and have a lien for their unpaid purchase-money on the lands which they have sold to the company. They have remedies against the company which the general creditors have not, as is exemplified by the cases of *Walker* v. *Ware, Hadham, and Buntingford Railway Company* (1); *Bishop of Winchester* v. *Mid-Hants Railway Company* (2). The Legislature may well, therefore, have intended to make a distinction between them and the general creditors, who are a class fluctuating from day to day.

The LORD JUSTICE LORD CAIRNS:—That argument might, perhaps, tell against you. The landowner having a specific lien, which cannot be done away with, the suspension of his remedies might be less injurious to him than to an ordinary creditor.

Mr. *W. W. Mackeson*, in reply.

(1) Law Rep. 1 Eq. 195. (2) Law Rep. 5 Eq. 17.

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Jan. 28. LORD CAIRNS, L.J., after briefly stating the nature of the case, and the order appealed from, continued:—

The Act contains various provisions essentially distinct in their character, amending the previous law as to railways. These provisions may be divided into six heads; and although the divisions indicated in the printed copies of the Act may not be any part of the enactment, they are, in my opinion, accurate. The first division is the "Protection of Rolling Stock and Plant," by sects. 4 and 5. Passing over for a moment the second division, extending from sect. 6 to sect. 22, the third division, sects. 23 to 26, relates to the borrowing powers of companies, described as "Loan Capital;" the fourth division, sects. 27 to 30, to "Share Capital and Audits;" the fifth, sects. 31 to 35, to the "Abandonment of Undertakings;" and the sixth division, sects. 36 to the end, to improvements in the provisions of the *Lands Clauses Consolidation Act*, 1845, as to compulsory purchase of land.

All these divisions, except the second, relate to all railway companies without distinction. The second is confined to railway companies unable to meet their engagements with their creditors; and as to companies so circumstanced it introduces provisions of a somewhat novel kind. Hitherto such companies, if they desired to raise further capital to meet their engagements, have been forced to go to Parliament for a special Act, enabling them to offer such advantages by way of preference or priority to persons furnishing new capital as would lead to its being obtained. And Parliament, in dealing with such applications, has been in the habit of considering how far the arrangements proposed as to such new capital were assented to or dissented from by those who might be considered as the proprietors of the existing capital of the company, either as shareholders or bondholders. The object of the present Act, in this part of it, appears to be to dispense with a special application to Parliament of the kind I have described, and to give a parliamentary sanction to a scheme filed in the Court of Chancery, and confirmed by that Court, and assented to by certain majorities of shareholders and of holders of debentures and securities *ejusdem generis*.

For this purpose a scheme is to be filed in the Court of Chancery, which is described in sect. 6 as "a scheme of arrangement be-

tween the company and their creditors (with or without provisions for settling and defining any rights of shareholders of the company as among themselves, and for raising, if necessary, additional share and loan capital, or either of them.)" The scheme is to be accompanied by a declaration and affidavit that the company is unable to meet its engagements; sects. 10 to 15 describe the various bodies of persons interested in the company, as to whom the assent to the scheme of a majority shall bind the minority. These bodies are:—

6 Eq 452

(1.) Holders of mortgages or bonds issued under the company's special Act. (2.) Holders of any rent-charge or other payment charged on the receipts of, or payable by, the company in consideration of the purchase of the undertaking of another company. (3.) Guaranteed or preference shareholders. (4.) Ordinary shareholders. (5.) Debenture holders and shareholders in the leasing company, if the arranging company are lessees of a railway.

The consent of any of these classes may be dispensed with if the scheme proposed does not affect the rights of such class.

Up to this point there is no suggestion as to the consent of any unpaid landowner or general creditor being requisite, or as to their interests being affected by the scheme.

The 16th section provides that the directors of the company, if within three months from the filing of the scheme, or within such extended time as the Court may allow, they think the requisite assents have been obtained, may apply to the Court of Chancery to confirm the scheme.

The 17th section enacts that the Court, after hearing the directors, and any creditors, shareholders, or other parties whom it thinks entitled to be heard, may, if satisfied that the scheme has been assented to as required by the Act, and that no sufficient objection to it has been established, confirm the scheme.

The effect of the scheme, when confirmed, is defined by the 18th section. It is to be binding and effectual to all intents, and the provisions thereof are against and in favour of the company and all parties assenting to it, or bound by it, to have the like effect as if they had been enacted by Parliament.

6 Eq 453

I stated at the close of the case of the company, that although this was not the proper time for deciding what would be the effect

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of the scheme in the present case, I could not, for the purpose of the present application, read the Act as giving it any force or validity, much less the force of an enactment, as against outside creditors—that is, general creditors—or against unpaid landowners. The persons against whom it is to have effect are those assenting to it or bound by it, that is, those who have actually agreed to it, or those who, not having agreed to it, are declared by the previous sections to be bound; in other words, the majority and the minority of the various classes whose votes are to be taken. If outside creditors or unpaid landowners were to be bound by the scheme, they must be bound by it even though it postponed or gave them a dividend only on their debts, and they would be in a much worse position than shareholders or debenture holders, for no opportunity is given, or provision made, for their assenting to, or dissenting from, the scheme.

Returning to the Act, the 19th, 20th, and 21st sections need not, for the present purpose, be referred to. The 22nd section closes this part of the Act, by giving power to the Judges of the Court of Chancery to make rules for the practice of the Court as to the jurisdiction thus given to them.

I omitted, in going through this *facsiculus* of clauses, the 7th and 9th, which are those on which the present application is founded. I think the object and meaning of these clauses are sufficiently clear. The company is unable to meet its engagements. The scheme is expected to result in the production of new capital, or loans, wherewith the engagements may be satisfied. But if, while the scheme is maturing, and the requisite assents are being obtained, the company and its property are torn asunder and destroyed by litigation and executions, the remedy proposed by the scheme will come too late. An interim power must therefore be given to the Court (up to what point that interim power may and ought to be exercised is not now the question) to stay actions on proper terms, and executions must be made dependent on the leave of the Court. This power of interfering, even by way of suspension, with the legal rights of creditors is no doubt a strong one. But it is, on the one hand, absolutely necessary if the end which the Legislature has in view is to be accomplished: and, on the other hand, the exercise, with judicial discretion and

upon a scheme framed in good faith, of such a power, must be the course most beneficial to the creditors themselves, and most likely to result in the ultimate payment of their debts.

The present application is to restrain, under the 7th section, the suits of unpaid landowners. What I have said would go to shew that there was every reason why outside creditors of all kinds, including landowners, though not bound by the scheme, should be included in the 7th section. The words are as large as possible; and, as I understand, the Vice-Chancellor was of opinion that if the 23rd section had not been in the Act, the Court would have had jurisdiction to restrain the proceedings of a landowner under sect. 7; it was, as the order states, on the construction of the 23rd section that he decided against the jurisdiction.

Now it is to be observed that the 23rd section is the commencement of a division of the Act distinct from that as to arrangements, and applying to all railway companies. It appears, in fact, to be the introduction into a general Act of a clause which in the special railway Acts, or most of them, passed in the sessions of 1866 and 1867, was inserted as a provision applicable to the particular company applying for a special Act. The object of the clause appears to be to make clear the priority of money borrowed on mortgage, bond, or debenture stock, as against claims on the company on account of debts or engagements incurred or entered into by them after the passing of the Act. The section, after declaring this priority, continues thus:—[His Lordship read the proviso.]

Now it appears to me that the words "anything hereinbefore contained" are ambiguous, and may mean either anything before contained in this Act, or anything before contained in this section; and that we must discover from the context and the general scheme of the Act which of these two meanings is the proper one.

If this clause at the end of sect. 23 is intended to except the case of landowners from the operation of sects. 7 and 9 in the division of the Act as to arrangements, it is strange that these words were not introduced into some part of that division, nor introduced in some other part of the Act as a substantive enactment, but were dropped, as it were, into the end of a section relating to a different subject.

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Further than this, it is clear that if the landowners are excepted from the operation of all the preceding parts of the Act they must be excepted from sect. 4, which protects rolling stock against execution. The consequence would be that an unpaid vendor of land might bring an action for the price, obtain a judgment, and take in execution and sell the rolling stock of the company, which would be contrary to the manifest policy of the Act. And this strange result would follow, that the unpaid vendor of the rolling stock, who had no security or lien for his purchase-money, would be prevented from levying his execution on the stock, while it would be taken by the unpaid vendor of land who would have his lien on the land besides.

It is further to be observed, that the vendor of land who has sold his land, getting in return a rent-charge under the *Lands Clauses Consolidation Act*, with a power of distress, and who, in regard to his claim for that rent-charge, is surely in as high a position as an unpaid vendor of land, would by this construction of the 23rd section be protected only against the priority mentioned in it, and not against the earlier sections of the Act, and no satisfactory reason can, in my opinion, be suggested why the owner of the unpaid rent-charge and the unpaid vendor of land should be put by the Act on a different footing.

It was said, as a reason why an unpaid vendor of land should be more favoured than general creditors, and not restrained like them in his remedies while the scheme was maturing, that a railway company should not take land or make their railway over it until they were able to pay for it. This may be a just observation, but it applies, in my opinion, to the purchase of many things besides land; and I am not sure that there might not be suggested a difference unfavourable for the purpose of this argument to the position of a landowner as compared with that of other creditors, namely, that other creditors have no security, and the property of the company may be lost or alienated during any suspension of their remedies, whereas the landowner has his lien, not always I agree a satisfactory one, upon the land. Land, it is true, may be taken by the railway company by compulsion, but the landowner need not unless he wishes give possession without payment of the purchase-money to himself, or a deposit made in the bank, and

this present Act contains provisions for the purpose of making that deposit a more full and real security for the purchase-money than it has hitherto been.

The Vice-Chancellor attached great weight to the change in expression "nor shall anything hereinbefore contained affect any claim for land taken, &c.," as contrasted with the words, "Provided always that this priority shall not affect any claim, &c." This argument is, no doubt, entitled to much consideration, but it is not in my opinion, sufficient to carry back the words "hereinbefore contained" beyond the 23rd section. In the special Acts to which I have referred, or many of them, it will be found that this clause occurs with precisely the same change of expression in the latter part of the proviso, and in many, if not in most of them, it would, in my opinion, be impossible to say that there was anything in the parts of the special Acts preceding the section in question to which the words "hereinbefore contained" could apply.

The argument, therefore, as I think, greatly preponderates in favour of the construction which confines "hereinbefore" to sect. 23, and I should be of opinion, speaking with great respect to the Vice-Chancellor, that in a proper case there was jurisdiction to restrain proceedings of the unpaid vendor of land under sect. 7, and that an unpaid vendor would be obliged, under sect. 9, to obtain leave of the Court before issuing process.

The question, however, remains: Is this a proper case for staying such proceedings? I am clearly of opinion it is not. Without professing to lay down any rule which is to meet every case, I cannot think it would be right that the Court should suspend the proceedings of any unpaid landowner, or, indeed, of any outside creditor, unless it saw that a scheme was proposed in good faith which, if it reached maturity, would afford a reasonable prospect of providing for the payment of the claims of creditors, and thus compensate them for a temporary suspension of their remedies. [His Lordship here read the 5th and 7th articles of the scheme.]

These clauses hardly require comment, and indeed were scarcely attempted to be justified by argument. They provide in substance not that the landowner shall be paid, but that he shall not be paid, that he shall lose his right of suit and action, and that in lieu of his debt he shall receive an obligation of the company, for the

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payment of which no provision is made, and which as to priority is to rank *pari passu* with similar obligations to be given for the claims of other landowners and creditors and with the whole debenture debt in Schedule A to the scheme. It appears to me to be impossible to suppose, holding as I do that the scheme if matured would not bind a landowner or outside creditor, that the Court would during the maturing of the scheme suspend the remedies of the landowner.

I am, therefore, of opinion that the application made to the Vice-Chancellor against the present Respondents was properly refused, and properly refused with costs. I am unable to concur in the *ratio decidendi* introduced into the order, and as this, if allowed to stand, might have embarrassed the company in proceeding under a new scheme, I think they were entitled to come here to have it reviewed, and that the following words in the order, viz., "This Court being of opinion that the creditors to whom moneys are now due in respect of the purchase of land are, by the 23rd section of the above-mentioned Act, excepted from the operation of all the preceding part of the said Act," ought to be omitted, and that except as to this alteration there ought to be no further order, and no costs on this appeal.

Solicitors for the Company: Messrs. *N. C. & C. Milne.*

Solicitors for Landowners: Messrs. *Boys & Tweedies*; Messrs. *Jones & Blaxland.*

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1868
March 5, 7.

Will—Codicil—Revocation of Bequest of Share of Residue.

A testator, by his will, gave his residuary real and personal estate to trustees upon trust for his five sons as tenants in common, and by a codicil revoked and made void all the trusts in his will contained concerning his residuary estate, so far as the same trusts related to his son *R.*, or his interest therein, and in lieu thereof gave a pecuniary legacy upon trust for *R.*, his wife and children, and if *R.* should have no children, he directed that the said legacy should sink into the residuary estate, but so that *R.* or his representatives should not take any share or interest therein:—

Held, that the testator died intestate as to the trusts of one-fifth share of his residuary estate, and that the legacy was payable out of the residuary estate and not out of the share which was undisposed of.

JOSEPH SYKES, by his will, gave his residuary estate to trustees on trust for his five sons as tenants in common. By a codicil he revoked the trusts of his will, so far as the same related to his son *Reginald*, or his interest therein, and in lieu thereof gave to the trustees £15,000 upon certain trusts for the benefit of *Reginald*, his wife and children, and directed that if *Reginald* had no children the same should sink into, and be deemed part of, the residue, but so that *Reginald*, or his representatives, should not be entitled to any share therein.

Reginald Sykes claimed a share in the one-fifth of the residuary estate which had been given to him by the will, as one of the next of kin, contending that it was undisposed of. Three of the other brothers, and the representatives of one who was dead, contended that they took the whole of the residue between them; but that if one-fifth was held to be undisposed of, the £15,000 ought to be paid out of that one-fifth, and not out of the residue.

The Master of the Rolls decided in favour of *Reginald Sykes* on both points, as reported (1), where the facts are fully stated.

The other brothers, and the representatives of the deceased brother, appealed.

Mr. *Baggallay*, Q.C., for the Appellants:—

The Master of the Rolls founded his decision on *Cresswell* v.

(1) Law Rep. 4 Eq. 200.

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Cheslyn (1), the decision in which has often been questioned, as appears from *Shaw* v. *McMahon* (2); *Humble* v. *Shore* (3); *Lightfoot* v. *Burstall* (4). Moreover, in this case there are special words, as the testator has declared that *Reginald* is not to have any share of the residue. The testator clearly intended to let *Reginald* have nothing but his interest in the £15,000. The passage in *Jarman* on Wills (5), as to the effect of revocation in such a case, was relied upon on the other side, but the cases cited, *Harris* v. *Davis* (6), and *Alexander* v. *Alexander* (7), do not bear out the text, whilst *Humphrey* v. *Tayleur* (8) is a clear authority the other way.

As to the second point: the £15,000 must be taken out of this share, or else the other brothers are actually injured by the codicil instead of being benefited.

Mr. *Rendall*, with Mr. *Baggallay*:—

It is difficult to understand what was done in *Cresswell* v. *Cheslyn*, and the decree as given in 3 Bro. P. C. 246, is not intelligible (9).

It was quite open to the testator to give to the other sons by excluding *Reginald* as well as by a direct gift, and this he has shewn his intention to do: *Ramsay* v. *Shelmerdine* (10); *Lett* v. *Randall* (11). As to the effect of the revocation of part of a legacy, *Thompson* v. *Watts* (12), and *Evans* v. *Field* (13), are in our favour. On the second point, *In re Wood's Will* (14) shews clearly that the £15,000 is not to be taken out of the general residue.

Sir *Roundell Palmer*, Q.C., Mr. *Jessel*, Q.C., Mr. *Speed*, Mr. *Wickens*, Mr. *Fry*, and Mr. *Bedwell*, appeared for other parties, but were not called upon.

LORD CAIRNS, L.C.:—

I have a strong impression, and it is always unsatisfactory to have such an impression, that if the legal effect of the words which the

(1) 2 Ed. 123; 3 Bro. P. C. 246.
(2) 4 D. & War. 438.
(3) 7 Hare, 247.
(4) 1 H. & M. 546. 10 Jur N S 368
(5) Vol. i. p. 158.
(6) 1 Coll. 416.
(7) 5 Beav. 518.
(8) Amb. 136.
(9) The decree as given in Bro. P. C. agrees with the record Reg. Lib. A. 1761, fo. 180.
(10) Law Rep. 1 Eq. 129. 11 Jur N S 968
(11) 3 Sm. & Giff. 83; 2 D. F. & J. 388. 10
(12) 2 J. & H. 291. 8 Jur N S 760.
(13) 8 L. J. (Ch.) 264.
(14) 29 Beav. 236.

16 Jur N S. 157.

testator was using had been pointed out to him, he would have made a different disposition by this codicil. With that, however, I have nothing to do, and I have only to put a proper construction upon the words which he has used, according to the authorities. The cases are clear, that if there is a devise or bequest of residue to a number of persons *nominatim* as tenants in common, and then a revocation of the devise or bequest of one of the shares, that share does not fall into the residue, but becomes undisposed of and goes to the next of kin or heir-at-law. That was decided, if a decision was necessary, by the case of *Cresswell* v. *Cheslyn* (1), and subsequent cases have occurred in which the same principle has been fully recognised. *Harris* v. *Davis* (2) was one of them, in which there was no doubt thrown upon the principle, though the operation of *Cresswell* v. *Cheslyn* was excluded by the very special words in the codicil. Now in this case there is a trust of the residue clearly and distinctly declared by the will for the five sons as tenants in common; and so, on the will, they stood each entitled to one-fifth. Then by the codicil the testator revokes and makes void all the trusts and directions contained in the will so far as they related to or affected *Reginald Sykes*, or his right, interest, or claim thereto or therein. Now, notwithstanding the comments which have been made on these words, they appear to be plain and distinct, a simple revocation of the devise and bequest of the one-fifth to *Reginald Sykes*, and if the testator had stopped at those words there would simply have remained a devise or bequest to four devisees or legatees, each taking one-fifth, and no disposition of the remaining one-fifth, which would go to the heir-at-law or next of kin.

Then is there anything special in the will which would make an alteration? The only thing is the bequest of £15,000, and the direction that if no child of *Reginald* should take a vested interest, the same was to sink into, and be deemed part of, the residuary personal estate. How that clause could apply if the personal estate had been insufficient to pay the £15,000, I need not now consider, but in my opinion the clause applies to the £15,000 alone, and contains no exclusion of *Reginald Sykes* from his share as one of the next of kin, even if the one-fifth is undisposed of. I think that

(1) 3 Bro. P. C. 246. (2) 1 Coll. 416.

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the decree of the Master of the Rolls declaring that there was an intestacy is quite right.

The only other point is as to the £15,000, which it has been contended ought to be paid out of the share which is undisposed of, but I see no ground for saying that that should be done. In the case of *In re Wood's Will* (1) there was an express direction that the legacy should be paid out of the particular share of the residue, but there is none here.

My opinion is, that the decree was right; and the appeal must be dismissed, with costs.

Solicitor for the Appellants: Mr. *Z. Brooke.*
Solicitors for the Respondents: Messrs. *Meyrick, Gedge, & Loaden.*

L. C. 1868 March 14

LAWTON *v.* PRICE.

Practice—Costs of appearing to consent.

Where the Respondents have by letter consented to the withdrawal of a Petition of Appeal, they will not be allowed their costs of appearing on the Appellant's motion for leave to withdraw the Petition.

ONE of the Defendants in this case had appealed against a decree made by the Vice-Chancellor *Stuart.* His solicitors, after the appeal had been set down, wrote to the solicitors of the Plaintiff and of the other Defendant, stating that the Appellant wished to withdraw the Petition of Appeal, and was willing to pay any costs incurred, and asking if the Plaintiff objected. The solicitors of the Plaintiff answered that they had no objection.

Mr. *W. Morris* now moved for leave to withdraw the Petition.

Mr. *Dumergue* appeared for the Plaintiff, and Mr. *F. H. Colt* for the other Defendant, and asked for their costs of appearing (2): and mentioned *Brashier* v. *Wyatt,* before Lord Justice *Rolt* (10th December, 1867), where the circumstances were exactly the same, except that the Respondents had sent no answer to the Appellant's

(1) 29 Beav. 236. (2) See Dan. Chan. Prac. 4th Ed. p. 1366.

letter, and in that case the Respondents were allowed their costs of appearing.

THE LORD CHANCELLOR said that he could not approve of the course which these parties had thought fit to adopt. They were told that it was proposed to withdraw the Petition, and were asked if there was any objection, and they answered that there was none. Then, when notice of the motion was given, and the order might have been taken on an affidavit of service of that notice, they instructed counsel to appear. His Lordship thought that an order ought now to be made on this motion as of course, without saying anything as to the costs of the Respondents.

Solicitor for the Appellants: Mr. *W. T. Reeve.*
Solicitor for the Respondents: Mr. *H. T. Gastrell.*

L. JJ.
1868
Feb. 15, 17 18.

RANGELEY *v.* MIDLAND RAILWAY COMPANY.

Railways Clauses Act, s. 16—*Diversion of Footpath.*

The *Railways Clauses Act*, 1845, sect. 16, does not empower a railway company to divert a public footpath so as to place it upon land of which the company has not acquired the ownership.

A landowner sold certain land to a railway company, the purchase to be completed in six weeks, and it was agreed that if the company should "require any additional land of the vendor, adjoining or near the land sold, for the purposes of the railway and works, the same should be taken and paid for by the company" at a certain price per acre:—

Held, that this agreement authorized the company to take adjoining land for the purpose of their works at any time before the period limited by their Act for the completion of the works, and that though their compulsory powers had expired, they could acquire land under the agreement for the purpose of forming a new public footpath in substitution for an old one.

By an Act which received the royal assent on the 25th of July, 1864, the *Midland Railway Company* were authorized to make a certain branch railway. The *Lands Clauses Act* and *Railways Clauses Act* were incorporated. The powers for the compulsory purchase of land were not to be exercised after three years from the passing of the Act, but five years were allowed for the completion of the works.

On the 3rd of May, 1866, a written agreement was entered into between the Plaintiff and the company for the sale by the Plaintiff to the company of about nine acres of land for the site of part of the railway, which sale was to be completed by the 26th of June. This agreement provided that the company might take possession of the land at any time, and should, if required, pay the purchase-money into a certain bank into the joint names of the vendor and a nominee of the company, to remain there, at the risk of the company, till completion, and then to be paid to the vendor. The agreement also contained the following provision (clause 10):—"In case the company shall require any additional land belonging to the vendor adjoining or near to the land hereby agreed to be sold, for the purposes of the railway and works, the same shall be taken and paid for by the company after the rate of £200 per acre, without any further payment for, or in respect of

severance, or other damage, or instead of accommodation works. And all the stipulations and provisions of this agreement shall be deemed to extend to such additional land as if it were included in the sale and purchase hereby specially agreed on."

The sale was completed on the 26th of November, 1866. The company proceeded to make their railway upon the purchased land, which was crossed obliquely by an ancient public footpath. The company found it expedient to divert this path. They accordingly carried it for some distance alongside their line; then carried it across the line by a viaduct, and then made from that point a new path, which ran across a meadow of the Plaintiffs adjoining the land he had sold to them, and then through a wood belonging to the Plaintiff, till it joined the old path. From the railway to this point of junction both the old path and the new were wholly situate on the Plaintiff's land. The length of the new path so made upon the Plaintiff's land was about seventy yards. The path was thus shortened so as to take up less of the Plaintiff's land; but was made to run through the middle of the meadow which it had not previously touched, the portion for which the new was substituted being nearly all within the wood. The company entered upon the Plaintiff's land in November, 1867, for the purpose of making this diversion, without giving him any notice o their intention. The Plaintiff stopped the new path, and upon the company threatening to re-open it he filed his bill, stating that the company pretended that by the agreement they were authorized to take possession of the additional lands for the purpose of making the footpath, though their compulsory powers had expired; submitting the construction of the agreement to the Court; and alleging that whatever was its true construction the company had no right to make the footpath on his land without first making compensation; and praying that the true construction of the agreement might be declared; that in the meantime, and if the Court should be of opinion that the company still had a right to purchase under the agreement, then, until the payment of compensation, the company might be restrained from interfering with the Plaintiff's lands; and for an inquiry as to damages.

An injunction having been applied for, Vice-Chancellor *Malins*, on the 19th December, 1867, made an order refusing an injunction,

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but ordering the company to pay into Court £250 to answer any damage the Plaintiff might have sustained, such damage to be ascertained under the Acts, and reserving the costs. The Plaintiff moved by way of appeal from the order; but upon the motion being opened it was arranged that instead of its being argued out, the cause should be heard before the Lords Justices.

Mr. *Glasse*, Q.C., and Mr. *F. Kelly*, for the Plaintiff:—

The company are taking the Plaintiff's land after their compulsory powers have expired. They cannot do so under their Acts, and the agreement does not extend the period: *Ex parte Walker* (1); *Bickett* v. *Morris* (2); *Tilley* v. *Thomas* (3).

Mr. *Cotton*, Q.C., and Mr. *Speed*, for the company:—

Sect. 16 of the *Railways Clauses Act*, 1845, gives the company a power of diverting footpaths, and sect. 32 gives them power to enter on land without making previous compensation. It is true that the present case does not come within the latter section, but as that clause gives power to enter without previous compensation for the purpose of making an entirely new road, so, by analogy, there must be a similar power for the purpose of diverting an existing road. This power must exist till the completion of the works, for it must often be impossible until that time to tell whether a diversion will be necessary.

[The LORD JUSTICE LORD CAIRNS:—The powers given by sect. 16 of the *Railways Clauses Act* are subject to the provisions of the *Lands Clauses Act*. How do you take the case out of the operation of sect. 84 of that Act?]

The 84th section can only refer to lands which the company require to occupy permanently for the purposes of their Act. They are not going to occupy or use this land permanently. If the company have occasion to divert a drain, can it be said that they are to buy the land under which it is to pass: *Macey* v. *Metropolitan Board of Works* (4) is in our favour, under a very similar clause. A company is not bound to pay for damage before executing the works which occasion the damage: *Hutton* v. *London*

(1) 1 Drew. 508.
(2) Law Rep. 1 H. L., Sc. 47.
(3) Law Rep. 3 Ch. 61.
(4) 10 Jur. (N. S.) 333.

and South Western Railway Company (1). If, however, we are wrong under the Acts, we have power to take land for this footpath under our agreement, which must be construed as empowering us to purchase at any time before our works are completed.

Mr. *Glasse*, in reply, referred to *Ramsden* v. *Manchester, &c., Railway Company* (2).

Feb. 18. LORD CAIRNS, L.J., after stating the facts, continued:—

The question then arises—what was the justification for the railway company and under what title did they enter upon the Plaintiff's meadow and make the substituted footway. In the first place they refer to the 16th clause of the *Railways Clauses Act.* Now I may say at once that this clause appears to me to shew conclusively that the diversion of this footway is part of the works authorized by the company's Act. But it is said that this clause authorizes a railway company to divert a public road, and to place the diverted or new road upon land which is not their own, and of which they have not become purchasers under their Act of Parliament. Now that appears to me to be a proposition of very serious moment, and railway companies having now exercised their powers for a great number of years, it appears strange that such a contest should now arise, and that no authority should even be suggested for such a proposition. The powers which are given by this 16th section are powers which clearly could not be derived from any other part of the Acts regulating railways. Under the powers given to railway companies to become the purchasers of land they would have no authority to divert public highways, or roads, or rivers, whether navigable or not navigable. It was therefore absolutely necessary that a specific and particular power should be given to them to execute works of that kind, and that appears to me the key to the construction of the 16th section. That section enables them to do what by the mere ownership or purchase of the land they could not do, namely, to deprive the public of rights

(1) 7 Hare, 259. (2) 1 Ex. 723.

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which they might have over highways, and over rivers, and over public drains and things of that kind. But the 16th section is prefaced by what seems to override the whole, namely, "subject to the provisions and restrictions in this and the special Act and any Act incorporated therewith" the company may exercise the powers which are specified. Now in the special Act relating to the railway now in question the *Lands Clauses Consolidation Act* is incorporated, and therefore these powers with regard to roads must be exercised subject to the provisions of the *Lands Clauses Act*, and it is clear from the perusal of the 84th section of that Act, that if the land upon which this new public footway is to be constructed is land which is to be permanently used under the powers of the special Act, then before the land can be so used the railway company must acquire it and must pay for it, and the question therefore seems to me to be narrowed to this: is the land on which the new footway is to be made land which is to be permanently used under the powers of the Act?

Now it is said that it is not to be permanently used, and that the only object of the company is to create an easement over it, and that the land will remain the freehold and property of the original owner subject to that easement. I will assume, in the first place, that that is a correct expression, and that the object is to create what is properly termed an easement over the land, but, assuming that to be so, it appears clear that to create an easement over land you must possess the ownership of the land. Every easement has its origin in a grant expressed or implied. The person who can make that grant must be the owner of the land. A railway company cannot grant an easement over the land of another person. They may grant an easement as soon as they become the proprietors of the land but not until they become such proprietors. They must own the servient tenement in order to give an easement over the servient tenement. But I must also observe that it appears to me to be an incorrect expression to speak of this as an easement. There can be no easement properly so called unless there be both a servient and a dominant tenement. There is in this case no dominant tenement whatever. It is true that in the well known case of *Dovaston* v. *Payne* (1), Mr. Justice *Heath* is

(1) 2 Sm. L. C. 132, 6th Ed.; 2 H. Bl. 527.

reported to have said with regard to a public highway that the freehold continued in the owner of the adjoining land subject to an easement in favour of the public, and that expression has occasionally been repeated since that time. That, however, is hardly an accurate expression. There can be no such thing according to our law, or according to the civil law, as what I may term an easement in gross. An easement must be connected with a dominant tenement. In truth, a public road or highway is not an easement, it is a dedication to the public of the occupation of the surface of the land for the purpose of passing and repassing, the public generally taking upon themselves (through the parochial authorities or otherwise) the obligation of repairing it. It is quite clear that that is a very different thing from an ordinary easement, where the occupation remains in the owner of the servient tenement subject to the easement.

The result, therefore, appears to me to be, that what the railway company desire to do is to dedicate to the public a way over the land of the Plaintiff, which will deprive him of the occupation of the land on which the road is formed, and will require a permanent user of that land for the purpose of the road; and if that is so, the case is exactly within the 84th section of the *Lands Clauses Consolidation Act*, and the railway company must acquire the ownership of the land in order to make that dedication.

I have gone at length into the question because it was gravely argued that it would be a great surprise upon railway companies if it were found that this was their obligation. I own I cannot myself think there will be any surprise in the matter, or think that the course taken by railway companies hitherto has been different from that which I have mentioned. It appears to me to be free from all doubt, and that in this case the ownership of the land must be obtained by the railway company.

How, then, are they to obtain this ownership? The time for the compulsory purchase of land has expired, and if they can proceed only by way of compulsory purchase, they cannot acquire the ownership at all. It is said, however (and that is the next point to be considered), that they can acquire it under the agreement of the 3rd of May, 1866:—[His Lordship read the clause set out above.] This is an option, therefore, given to the railway com-

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pany to take, upon certain terms, additional land. The question is, within what time was that option to be exercised? It was said that a general or perpetual option, to be exercised without limit of time, cannot have been intended; and with that I clearly agree. What, then, is the limit? The first suggestion is, that as the agreement provided that the purchase of the nine acres should be completed on or before the 26th of June then next, that date must apply also to any purchase under the 10th clause. But the interval between the 3rd of May and the 26th of June obviously is not more than the time that would be required to prepare and to examine abstracts, and to clear up all the questions which would naturally arise upon any purchase of land. It appears to me to be almost absurd to suppose that it was meant that future purchases of land, which it was not known at the time whether the railway company would want or not, were to be completed within the six weeks within which the first purchase was to be completed. I am obliged, therefore, to reject that interpretation.

22 L.J. 52.

Then two alternatives remain:—Was the option to be exercised within the three years during which compulsory purchase might take place, or within the five years during which the railway and works might be completed? That point has occasioned me some anxiety, and much may fairly be urged in support of either view. But, upon the whole, I think the fairer and more just construction is to take the limit of five years. I think the wording of the clause looks strongly in that direction:—"In case the company shall require any additional land belonging to the vendor, adjoining or near to the land hereby agreed to be sold, for the purpose of the said railways and works." The Act of Parliament said the railways and works must be completed within five years; and it seems to be almost a natural consequence to read the agreement as if it ran in these words:—"In case the company shall require additional land for their railway and works within the time limited for the completion of their railway and works." Moreover, the words are not "in case the company shall *take* additional land for their railway and works," which might fairly be said to point to the exercise by the company of their compulsory powers, but "in case the company shall *require* any additional land," &c. It must also be borne in mind that, if the intention of the vendor was to limit the

company to the period for the exercise of their compulsory powers, it was incumbent on him to have this clearly specified in the agreement. The result, therefore, is, that in my opinion the company have the power to take the land, which, as I have held, they are bound to take before they can make a footpath over it.

But what was the course taken by the company? Admitting that the 10th clause of the agreement gave the company power to take the additional land, it was, in my opinion, clearly incumbent upon them to give notice to the Plaintiff that they required additional land, and how much they required, in order that he might exercise his judgment upon the question, whether it was land adjoining or near the land agreed to be sold, and with regard to the measurement of the land, and in order, above all, that he might exercise the right which is given to him by the agreement of requiring the purchase-money to be paid into a bank before possession was taken. Instead of this, the company entered into possession of the land without giving him any notice at all. These observations appear to me to dispose of the question of costs. The bill appears to me to be framed with perfect propriety for the purpose of raising the real question in the case, and obtaining the decision of the Court upon it. It is true that upon the argument before the Vice-Chancellor the Plaintiff seems to have gone somewhat further, and to have contended absolutely that the time for compulsory purchase having expired, the company were not entitled to purchase at all. But, on the other hand, an equal departure from the limits of moderation took place in the argument on the Defendants' side, for they contended that they were entitled to make the road without purchase at all. I think, therefore that I must judge of the case as when the bill was filed, and upon the issues raised by the bill. Judging of it in that way, it appears to me that the Defendants were entirely in the wrong, and that the question as to the costs of the suit must be decided in favour of the Plaintiff. The decree we propose to make will be of this nature:—The Court being of opinion that the ground of the Plaintiff occupied by the new or diverted footway in the bill mentioned is land required to be permanently used under the powers of the Acts in the bill mentioned, and that the Defendants having taken the same for the purpose of the said footway, are bound

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and entitled to purchase, and bound to pay for the same, under and according to the contract of the 3rd of May, 1866; and it being admitted that the measurement of the said ground is , and that the price thereof according to the said contract would be the sum of £ , order the Defendants within a fortnight to pay to the Plaintiff the said sum of £ , and order the Defendants to pay to the Plaintiff his costs of this suit, by which I understand his costs of the suit throughout, both before the Vice-Chancellor and here. The money which is in Court will be paid to the Defendants after they have paid the price of the land and the costs of this suit.

SIR C. J. SELWYN, L.J.:—

In this case an objection was taken on the part of the Defendants, the railway company, to the Plaintiff's right to sue in this Court. It was said that as the Plaintiff had resumed possession of the land occupied by the new footpath, and had removed the stile, he had taken the law into his own hands, and that his remedy, if any, was at law. But the Plaintiff alleges that the Defendants intend to enter again upon his land, and to resume their former operations; and, so far from denying any such intention, the Defendants, in a letter of the 3rd of December, 1867, spoke of restoring the footpath, and both in the Court below and before us they have asserted their right to do again what they did before. Under those circumstances, assuming the Plaintiff to be right in other respects, I think he was entitled to seek relief in this Court for the protection of his property, and that the objection fails.

Upon the merits of the case the Defendants justify their entry upon the Plaintiff's land without having made any payment or deposit upon two grounds: first, that they were authorized by the *Railways Clauses Act*, and especially by its 16th section, to divert the footpath without purchasing the land upon which the new footpath was made; and, secondly, that they were entitled to enter upon the land in question under the provisions of the agreement of May, 1866. Upon the first point it was argued that the company do not intend to take or keep the land in question; that they do not require permanently to use it; that they only

require an easement, and that not for themselves, but for the public: moreover, that as the former footpath was diverted they had a right to substitute a new one. But, as the Lord Justice has observed, the 84th section of the *Lands Clauses Act* prohibits entry upon the lands required to be purchased or permanently used for the purposes of the Act until the purchase-money or compensation has been paid or deposited.

The company assert—and, I think, rightly—that the land is wanted for the purposes of the Act, otherwise they would not be entitled to enter upon it at all, either under the Act of Parliament or under the agreement; and it only remains to be considered whether the land is required to be purchased or permanently used. It appears to me to be difficult to conceive any more permanent use of land than the dedication of a right of way over it to the public. If the land had been taken by the company, and used by them for their own purposes, they might be able at some future time to restore it by means of an alteration in their own plans or works, but a right of way, when dedicated to the public, cannot be got rid of by any agreement between the parties; the right is perpetual; and in order to create such a right, the absolute ownership of the surface of the land, or the consent of the owner, must be obtained. It was admitted in argument that the diversion of a footpath which runs over one man's land would not justify the taking without purchase or payment another man's land for the purposes of a new path. And the statute, in my judgment, affords equally little ground for the contention that a railway company by diverting a path upon one portion of an estate can acquire without agreement or purchase another part of the same estate for the purpose of a new footpath. I think, therefore, that the company were not authorized by the Acts of Parliament to enter upon the land in question without having first paid or deposited the purchase-money or compensation.

There remains the question whether they are now entitled to purchase it under the agreement, and that question depends upon the construction of the 10th clause of the agreement. Upon this point the Vice-Chancellor *Malins* seems to have considered himself bound by a former decision of Vice-Chancellor *Kindersley*. But the counsel on both sides are agreed that the only case before Vice-

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Chancellor *Kindersley* which was cited was *Ex parte Walker* (1), in which case Vice-Chancellor *Kindersley's* judgment proceeded upon the ground that there was no agreement for the purchase of any particular land, but only a contract as to the price of any land which might afterwards be required; and, consequently, that there was no conversion. The question as to the duration of the agreement could not arise, as the agreement was expressly confined to the period limited by the Act for compulsory purchase.

I think it probable that the precise point which we are now to determine was not present in the mind of either of the parties to the agreement at the time it was entered into, but we cannot suppose that it was intended by either party that the agreement for the purchase of additional land should be unlimited in point of time, or should endure for all time. On the other hand, the period between the 3rd of May and the 26th of June, 1866, was so short, that to confine the agreement within those limits would leave it very little, if any, practical operation or effect. We are then brought to the choice between the two other periods which have been suggested, namely, the three years and the five years. And while upon this 10th clause of the agreement there is not, as there was in the case of *Ex parte Walker*, any reference to the period limited for compulsory purchase, we do find a reference to the "railways and works" which may be considered as, at least indirectly, pointing to the period within which those railways and works were to be completed, that is to say, the period of five years.

I think, therefore, the company are still entitled to purchase the land under the agreement. But the Plaintiff was at least entitled to some information from the company as to what they intended to do, as to the quantity of land adjoining or near the land comprised in the agreement which they required to take, and as to the purchase-money, which ought to have been paid or deposited before possession was taken. But the railway company did none of these things; and, on the whole, I think the justice of the case will be met by such a decree as the Lord Justice has suggested.

Solicitor for the Plaintiff: Mr. *W. M. Wilkinson.*
Solicitors for Defendants: Messrs. *Beale, Marigold, & Beale.*

(1) 1 Drew. 508.

In re FRENCH.

L. J. C.
1868
Jan. 31.

Lunacy—Liability of Committee of Person to account.

Where an annual sum of money is ordered to be paid to the committee of the person for the maintenance of a lunatic, the committee is not bound to keep accounts, and, as a general rule, will not be ordered to account.

But the committee may be ordered to account under special circumstances, as when the lunatic has been improperly maintained, or the sum allowed has clearly not been expended.

Where a committee had received one allowance for the maintenance of a lunatic and another for the maintenance of her infant children, and had, after properly maintaining the lunatic, spent the remainder of her allowance on the maintenance of the children:—

Held, that he would not be ordered to account on the Petition of the children.

BY an order made in Lunacy the Rev. *H. T. Mostyn* was appointed committee of the person of Mrs. *French*, a lunatic; £350 a year was directed to be paid to him for the maintenance of the lunatic, and £500 for the maintenance of her infant children. The children, two of whom had come of age, now presented a Petition praying that Mr. *Mostyn*, the committee, might be discharged, and might be ordered to account for the expenditure of the annual sums allowed for the maintenance of the lunatic. In support of the Petition affidavits were filed by some of the children that much less than £350 was spent upon the lunatic's maintenance, and that the rest could not have been spent on the maintenance of the infant children. The committee filed an affidavit that he was not able to furnish accounts: he admitted that he had not spent the whole of the £350 a year on the maintenance of the lunatic, but said that he had spent the remainder, and the £500 a year, on the maintenance of the children. The facts are fully stated in his Lordship's judgment.

Mr. *Greene*, Q.C., and Mr. *W. R. Ellis*, in support of the Petition.

Mr. *Swanston*, and Mr. *B. B. Rogers*, for Mr. *Mostyn*, were not called upon.

LORD CAIRNS, L.J., after stating that the committee was willing to be discharged, and that this Petition was unnecessary for that

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purpose, and that it was to be regretted that no application had been made to Mr. *Mostyn* on the subject of the expenditure before the service of the Petition on him, continued:—

A question has been raised as to the jurisdiction of the Court in such matters. The orders for maintenance which the Court is in the habit of making are of two forms. There is the common form of order, allowing so much money for maintenance *simpliciter*, and there is another form, adopted very much of recent years, which allows to the committee of the person such sum, not exceeding a certain fixed amount, as shall be applied for maintenance. The difference between those forms as regards the result is obvious. As a general rule, though there are exceptions, an allowance of a fixed sum for maintenance throws no responsibility on the person to whom it is paid of keeping vouchers or passing an account from time to time as to the items expended in maintenance, and the object of the order in that form is to dispense with such liability to account. On the other hand, an order made in the alternative form to which I have referred, directly and advisedly imposes upon the person who receives the sum allowed the liability to keep his accounts for maintenance, to prove how much has been expended for that purpose; and he can be sanctioned in his expenditure so far only as he can shew that the money has been actually applied. It is, of course, unnecessary to point out, as a general rule, again using that expression advisedly, how unfair it would be in a case where the order had been made in the former of these two ways, that after a lapse of some years, the person who had undertaken the office in the expectation that it would not involve keeping accounts, preserving vouchers, and passing accounts from time to time, should be subjected to any process in which, when vouchers were lost and all memory of the precise sums had passed away, he would have to account on the principle of substantiating every sum that he had paid.

With regard, however, to the jurisdiction of the Court, I am not at all disposed to narrow that jurisdiction. In the case of *Grosvenor* v. *Draw* (1), the application was made after the death of the lunatic by the representative of the lunatic against the committee, and it is an observation which has been frequently made, and justly, as I

(1) 2 Knapp, 82.

apprehend, that it was sufficient for the determination of that case to say, that the jurisdiction in Lunacy was at an end, and that if any right could be asserted against the committee, it must be asserted in some other form. Accordingly, the order of Her Majesty in Council reversing the order made in the Court below, made that reversal distinctly without prejudice to any other proceeding which the Respondents might be advised to institute. In the case of *In re Ponsonby* (1) the expressions used by Lord *St. Leonards* are certainly very large, and but for them I myself should have thought that the case of *Grosvenor* v. *Drax* (2) had not gone to such an extent. Two other cases were mentioned in the argument to-day, the case of *In re Fitzgerald* (3), and *In re Jodrell* (4). With regard to the first case, which was before Lord *Redesdale*, it has really no bearing on the point, and only amounts to a statement of what I suppose is very clear, that the committee of the estate (not of the person) who accepts his office on the condition that he should always account, must account accordingly. As to the case of *In re Jodrell*, it seems to amount to this, that a specific sum was to be handed over by the committee of the estate to the committee of the person to pay for the outfit of a member of the lunatic's family; it was asserted that the payment had not been made, and the committee of the estate was held entitled to apply against the committee of the person to find out what had become of the money which had been handed over for that specific purpose. Those cases have little application to the present. I have been also furnished by Mr. *Wilde*, the Registrar, with notes of two cases which are more important, and which I think, shew very distinctly the sort of principle upon which the jurisdiction should be exercised. One was *In re Rosoman*, decided in 1822 by Lord *Eldon*, in which case an inquiry was directed; and if the allegation made was correct, that the lunatic, having an allowance of £640 a year, was deprived of the common necessaries of life, there was a *constat* of the clearest and best kind that the allowance for maintenance had been misapplied, and that an account would shew the extent to which the misapplication had taken place. Ultimately, no further order was made in that case,

(1) 3 D. & War. 27.
(2) 2 Knapp, 82.
(3) 2 Sch. & Lef. 432.
(4) Shelf. Lun. p. 182.

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the committee appearing to have gone abroad. The other case was *In re Wood*, before Lord *Cottenham* in 1839. It was on the Petition of the next of kin, stating that particular sums had been paid to an asylum-keeper for the maintenance of the lunatic from 1822 to 1838, that the lunatic was in an asylum, that the only expenditure was through the medium of the asylum, and it shewed that those payments were less than the allowance, and prayed for an inquiry, which was made. In that case, again, there being no question as to the amount of expenditure, it was easy to shew to demonstration whether the amount allotted for maintenance had or had not been expended.

I think the jurisdiction to the extent pointed out by these authorities is extremely wholesome, and I should be very unwilling to say one word which would imply that that jurisdiction should be limited. In cases like these, the Court clearly would have jurisdiction to direct an inquiry and account, and to make some consequential order upon the committee of the person.

But now I turn to the facts of the present case. The order for the allowance was made upon the Master's report, which stated, "it is proposed before me that a sum of £350 a year, to commence from the said 30th day of June, 1863, should be allowed for the maintenance of the said *Margaret French* according to the following scheme: namely, board and lodging of herself and an attendant, £200; wages of attendant, £40; clothes and incidental expenses, including expenses of committee of person in visiting, £60; medical attendance, £50; total, £350." Then it was proposed that, the income of the infant children being insufficient for their proper maintenance and education, a sum of £500 a year should be allowed out of the income of the lunatic towards their maintenance and education. Those were the proposals, and the order made was merely that £350 a year should be allowed for the maintenance of *Margaret French* from a certain date; and as to the children that, subject to the payment of the allowance of £350 a year for the maintenance of the lunatic, a sum of £500 a year should be allowed out of her income for or towards the maintenance of her infant children.

Now the period over which the operation of this order extends is something like four years, and Mr. *Mostyn*, in his affidavit, says

it is quite true that he did not expend £350 a year upon the personal maintenance of the lunatic, but that having £350, plus £500, to be expended upon the lunatic and her children, and the estate not always yielding the whole of those sums, but sometimes falling short of it, he spent the whole indiscriminately on the mother and the children,—that is, in paying for the mother at the asylum where she was boarded, at the expense of £150 a year, and paying some other incidental expenses for her, and so far as he made a saving after giving her the comforts she required, he expended the surplus for the benefit of the children, who were living in a separate establishment, and required a considerable sum of money annually. This is precisely and clearly stated by Mr. *Mostyn* in his affidavit, and his oath is distinctly pledged to the fact of the expenditure of the whole sum in this way; and if that is a true statement, I certainly am of opinion that it clearly is not a case in which the Court would direct any account. The Court might, on the matter being brought to its notice, have either re-adjusted the expenditure for maintenance between the mother and the children, if there was any sufficient case for it; or it might have required the scheme mentioned in the proposal to be adhered to for the future; but that the Court would, on the application of the very persons who have benefited by the savings from the mother's maintenance laid out on themselves, order a personal account against the committee of the person to make him repay the extra expenditure on the children is a proposition which could not for one moment be entertained.

Then is the evidence such that I can arrive at the conclusion that this is a correct statement by Mr. *Mostyn?* It is said that he cannot prove to demonstration what he says, and that he has no accounts and no vouchers. I think, from what I have already said, that it might be expected that the committee of the person, having an allowance for the maintenance of the lunatic and the children, would not preserve any vouchers to shew his expenditure. The Court in such cases takes very good care as to the lunatic, and is certified from time to time that the lunatic is well maintained, having regard to the amount allowed for the maintenance:—[His Lordship then read one of the reports made by a Visitor of the Court as to the lunatic]. So with regard to the

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children, the family were perfectly aware of the allowance made for them, and if there was any suspicion on the part of any member of the family that they were not maintained in accordance with the scheme it would have been quite open to them to have made a complaint; but it does not appear that any complaint ever was made. Then on whom does the onus lie to shew that the statement made by the committee is incorrect, and that a sum short of the allowance for maintenance has been expended on the family? In my opinion the onus lies entirely on those who present this Petition:—[His Lordship then commented on the evidence of the Petitioners, and expressed his opinion that their case was not proved.]

In this state of things I am bound to say that the onus lying on the Petitioners has not in any way been discharged, and that there is nothing whatever before me leading me to suppose that the statement laid before me on oath by Mr. *Mostyn* is not entirely correct. I do not say anything to prejudice any case, if there is any case, in respect of any responsibility as to money not subject to this jurisdiction, and anything that I do on this occasion will leave that matter entirely untouched.

I think the Petition entirely fails, and that it must be dismissed. As to the costs, I can give the Petitioners no costs. Mr. *Mostyn* must have his costs. I do not propose to make an order that the Petitioners shall pay his costs personally, but I propose to make an order that he shall have his costs in the lunacy. I think that that will meet the justice of the case, because the surplus beyond the amount allowed belongs in some sense to the Petitioners; and as to the change of the committee, I think the better course is that that should proceed in the ordinary way, not on an order made on this Petition, but that it should be in the first place by a report from the Master, which would come before me for confirmation without a hearing, which is the proper and inexpensive mode of appointing the new committee.

Solicitor for the Petitioners: Mr. *T. Parker.*
Solicitors for Mr. *Mostyn*: Messrs. *Miller & Smith.*

In re ANGLO-DANISH AND BALTIC STEAM NAVIGATION COMPANY.

L. J. C. 1868 Jan. 13, 14.

SAHLGREEN & CARRALL'S CASE.

Company—Contract to take Shares—Communication of Allotment necessary.

S. & C. agreed with the directors of a company to become agents for the company on certain terms, one of which was that *S. & C.* should subscribe for shares of the company to the amount of £600, and duly pay the instalments and calls thereon. *S. & C.* never applied for shares, but about ten months afterwards the directors passed a resolution allotting them shares to the amount of £600, and placed them on the register as holders of those shares, but no notice was given to *S. & C.* of the allotment or registration until after an order had been made for winding up the company:—

Held, that *S. & C.* did not become the equitable owners of, or liable to be placed on the register as holders of, any shares, until the fact of the allotment was communicated to them; and that as no such communication was made before the winding-up, they were not contributories, and were entitled to have the register rectified by removing their names from it.

THIS was an appeal by the official liquidator from an order of Vice-Chancellor *Wood*, rectifying the register of shareholders in the *Anglo-Danish and Baltic Steam Navigation Company, Limited*, by removing the names of *Sahlgreen & Carrall*.

The company was registered on the 23rd of October, 1865, as a limited company, with a capital of £200,000 divided into £10 shares.

On the 9th of November, 1865, an agreement was made between the subscribers to the memorandum of association of the one part, and *Sahlgreen & Carrall* of the other part, by which it was agreed that the company should appoint *Sahlgreen & Carrall* the shipping agents and insurance brokers of the company, and that *Sahlgreen & Carrall* would accept the appointment. *Sahlgreen & Carrall* agreed to enter on their agencies on the eighth day after the allotment of shares in the company. The appointment was to be for twenty years. The agreement contained provisions as to their duties and remuneration. By the 8th clause it was agreed that *Carrall* should be one of the first directors, and the 10th clause was as follows:—"The said *F. W. W. Sahlgreen*,

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and *T. S. Carrall* shall and will subscribe for shares in the said company to the amount of £600, and duly pay the instalments and calls thereon, and when they shall have sold their own boats, now running between *Copenhagen* and *Königsberg* and *London* and *Hull*, they shall and will increase the amount of such shares to be subscribed for to 100 shares."

This agreement was confirmed and adopted at a meeting of the directors on the 16th of January, 1866. The terms of it had been settled before the registration, and it was one of the agreements referred to in a clause of the articles, which, among other things to be done by the directors, provided as follows:—"They shall adopt and carry into effect certain contracts or agreements, marked respectively *A.*, *B.*, *C.*, *D.*, and *E.*, already entered into on behalf of the company by the subscribers hereto, in relation to the purchase of certain steamers, and the good-will of the business connected therewith, and to the employment of certain persons therein. Copies of the said agreements may be seen at [a place specified], and all persons interested, and now members of the company, or at any time hereafter becoming members of the company, shall be deemed to have notice of the said agreement or agreements, and of all the terms thereof, and of all matters therein contained."

On the 22nd of June, 1866, an agreement was made between the company of the one part, and *Sahlgreen & Carrall* of the other part, which recited and rescinded the former agreement, and substituted new terms, the most material of which were, that the company should employ *Sahlgreen & Carrall* as agents for the purposes therein mentioned; that *Sahlgreen & Carrall* should enter upon the agency as soon as certain arrangements between the *Anglo-Danish Company* and another navigation company were completed, and clause 11 provided that, "The said *F. W. W. Sahlgreen* and *T. S. Carrall* shall, during the continuance of this agreement, and so long as they shall be the agents of the said company, hold shares in the said company to the amount of £600 at least."

This agreement was determinable on twelve months' notice in writing by either party.

Nothing was done under this agreement till the 4th of Septem-

ber, 1866; on which day the directors passed the following resolution:—

"Pursuant to the agreement with Messrs. *Sahlgreen & Carrall*, the ship-brokers to the company in *London* and *Hull*, it was resolved that sixty shares in the company be and hereby are allotted to them."

This allotment was entered in the allotment book of the company as an allotment of sixty shares to "*Thomas Short Carrall, Sahlgreen & Carrall, Waldemar W. Sahlgreen.*" The entry on the register of members was of "*Sahlgreen & Carrall,*" in respect of sixty shares.

The arrangements between the *Anglo-Danish Company* and the other navigation company referred to above were never completed, *Sahlgreen & Carrall* were never appointed agents, never applied for shares, and were never informed of the above allotment having been made to them until after the winding-up order had been made. *Carrall* for some time sat as a director, but resigned the office on the 27th of August, 1866.

A winding-up order was afterwards made, and in July, 1867, *Sahlgreen & Carrall* received the first information of their being alleged to be members of the company from a notice by the official liquidator that their names were on the list of contributories as members in respect of sixty shares. They thereupon applied to have the register rectified by omitting their names, and on the 25th of November Vice-Chancellor *Wood* made an order accordingly.

Mr. *Kay*, Q.C., and Mr. *Osborne Morgan*, for the Appellant:—

Under the *Companies Act*, 1862, s. 23, all that is necessary to constitute a member is an agreement to become one in respect of a certain number of shares, and entry on the register in respect of those shares: *Elkington's Case* (1).

[The LORD JUSTICE LORD CAIRNS:—Was there any communication of the allotment to the Respondents?]

Though, according to *Pellatt's Case* (2), there must be some response by the company, it need not be a formal one: *Hebb's*

(1) Law Rep. 2 Ch. 511. (2) Law Rep. 2 Ch. 527.

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Case (1); *Stanhope's Case* (2). Here there was a binding acceptance of shares by the first agreement, and it was *ultrà vires* the directors to revoke it by the second. *Hodgson* v. *Le Bret* (3), *Emmerson* v. *Hellis* (4), furnish an analogy in our favour. *Levita's Case* (5) is very close to the present, and *Ex parte Morgan* (6) assists us.

Mr. *Roxburgh*, Q.C., and Mr. *Swanston*, for *Sahlgreen & Carrall*:—

There was no agreement to accept shares *in præsenti*, only an agreement to apply for shares. To make a man a shareholder there must be an appropriation of specific shares to him, and notice to him of it; this we never had. Our case is stronger than *Pellatt's Case* (7). The first agreement was conditional by *Sahlgreen & Carrall* to apply for sixty shares on being appointed agents of the company, which they never were. When the second agreement was made there were no shareholders, as no allotment had been made, and the directors could put an end to the first agreement. The second agreement was still more clearly conditional, and the condition was never fulfilled.

[The LORD JUSTICE LORD CAIRNS:—How do you account for *Carrall's* acting as director.]

That is not conclusive: *Marquis of Abercorn's Case* (8); *Austin's Case* (9). The directors, even if there had been an allotment, could have diminished the number of shares: *Mile's Case* (10).

Mr. *Kay*, in reply, referred to *Bleakly* v. *Smith* (11).

LORD CAIRNS, L.J.:—

The question in this case is whether, before the commencement of the winding-up, there was a binding agreement between *Sahlgreen & Carrall* and the company, authorizing the company to enter them on the register in respect of these shares, so as to make them members of the company without any notice to them

(1) Law Rep. 4 Eq. 9.
(2) Ibid. 1 Ch. 161.
(3) 1 Camp. 233.
(4) 2 Taunt. 38.
(5) Law Rep. 3 Ch. 36.
(6) 1 Mac. & G. 225.
(7) Law Rep. 2 Ch. 527.
(8) 10 W. R. 548.
(9) Law Rep. 2 Eq. 435.
(10) 12 W. R. 1129.
(11) 11 Sim. 150.

or consent by them. That question depends on the construction and effect of the agreements of the 9th of November, 1865, and the 22nd of June, 1866, for it is not suggested that the agreement which the official liquidator seeks to establish is to be found in any other document, or can be established by parol evidence. Take the first agreement, which I treat as an agreement between the company and *Sahlgreen & Carrall.* Its general character is that of an agency agreement for appointing *Sahlgreen & Carrall* agents of the company at certain ports and on certain terms. I need not go through the clauses defining their duties. The 8th clause provides that *Carrall* is to be one of the first directors. The 10th is the most material:—[His Lordship read the clause]. This, in its terms, is obviously an agreement pointing at a future application for shares. There may be some difficulty in ascertaining the meaning of the word "subscribe;" it cannot be meant literally, for in these companies there is not any subscription by shareholders to any document belonging to the company; it may mean subscribe a document asking for shares. But whatever the word means, the meaning of the whole sentence clearly is, that *Sahlgreen & Carrall* would take such steps as were necessary to ask for and obtain sixty shares. I will assume that this document created a correlative obligation to give them the shares. That being so, there is a binding and complete contract, but to what extent? It is a contract that *Sahlgreen & Carrall* will apply to the company for shares, and that the company, on their applying, will appropriate shares to them. That is a complete and binding agreement; but something more remained to be done before *Sahlgreen & Carrall* could become in equity the owners of the shares. It was urged that although, according to the natural meaning of the words and the scope of the agreement, *Sahlgreen & Carrall* were to put themselves in motion to obtain the shares, still, if they did not, the company might say: "You were bound to apply for sixty shares; we were always ready to appropriate them to you; we have so appropriated them, and you must be put on the list for them." But to complete this appropriation, to make it binding on *Sahlgreen & Carrall,* to make them equitable owners of the shares, and to entitle the company to enter them on the register, it was necessary that they should be informed of what

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was done, and, until notice was given to them, there was no binding appropriation which could make them owners of any shares. Nothing was done till the 4th of September, 1866, and it is important to observe what the company then did. They passed a resolution, the terms of which shew that no shares had been applied for, and that they understood that to enable them to enforce their rights under the agreement they must appropriate shares to *Sahlgreen & Carrall.* We find the company, therefore, acting according to the natural meaning of the words of the agreement.

Now it obviously was open to question what kind of entry on the register would tally with the terms of the agreement. Was each to subscribe for thirty shares, or were both to subscribe jointly for sixty, and, if so, which name was to come first? These points are important to owners of shares, and the extraordinary entries which were actually made in the books shew the necessity there was for communication of the allotment and mode of registration. No such communication, however, was made.

The above considerations are enough to dispose of the case. Admitting that there was a complete and binding agreement, it pointed at a future arrangement as to shares. This distinguishes the present case from *Levita's Case* (1). In that case the Court came to the conclusion, with which I agree, that *Levita* knew that his name was entered on the register in the way in which it was entered, and he was, therefore, rightly held to be a member.

But the case does not end there. What was the state of things when the resolution of the 4th of September was passed? *Carrall* had, on the 27th of August, resigned the office of director, in addition to which the agreement of the 22nd of June, 1866, had been entered into. It was contended that that agreement was *ultrà vires* for two reasons.

First: it was said that the agreement was *ultrà vires* because it purported to release an antecedent agreement to take shares. Now no doubt when membership is complete it cannot be got rid of in any but the statutory way—the directors cannot release the member from his obligations. Whether, when there is a complete contract to take shares, the directors can release the contracting party from

(1) Law Rep. 3 Ch. 36.

the contract, I give no opinion. This case is different. The agreement was not one primarily relating to shares in the company, but an agreement for settling the terms on which *Sahlgreen & Carrall* were to act as agents, one of which terms was that they should apply for sixty shares in the company, and accept them when appropriated. Before any shares had been applied for or appropriated, the second agreement, the *bona fides* of which is not impeached, was entered into, varying the terms of the old agreement, and making new terms as to the agency. It would be hard to say that the directors, in thus making new arrangements with an agent, could not alter the terms of the old arrangement as to his taking shares. It would be most inconvenient to lay such a restriction upon their power of arranging with an agent the terms on which he will conduct their business.

Secondly: it was said that the articles took notice of the contract, and bound the directors to adopt it. But I think the contract was noticed in the articles only for the purpose of shewing that it was brought to the knowledge of the company, and of giving the directors full power to carry it into effect, but I do not think that it was intended to take away from the directors the power of varying it.

I am of opinion, therefore, that the second contract was *intrà vires*. Now, it provides that the first contract shall be determined; so, before any shares had been appropriated, the agreement to take them was made void. The case thus is made to depend on the second agreement. Now, the objection that there was no notice of an appropriation of shares, applies with as much force under that agreement as under the former. In addition to which, I am disposed to think that, according to the true construction of the 11th clause, *Sahlgreen & Carrall* only agreed to hold shares while they were agents, in which case the Appellant is met by the difficulty that the agency never arose. Moreover, that clause does not say that *Sahlgreen & Carrall* are to take shares from the company, but only that they shall hold a certain number of shares, which would be satisfied by their buying shares in the market. The appeal must, therefore, be dismissed.

Solicitors: Mr. *Francis William Blake;* Mr. *Frederick Buckle.*

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FOSTER *v.* FOSTER.

15 & 16 *Vict. c.* 86, *s.* 42, *rule* 8—*Practice—Adding to Decree—Appeal from Order adding to Decree.*

An order adding to a decree under 15 & 16 Vict. c. 86, s. 42, rule 8, does not form part of the decree so as to require a petition of appeal to vary it; but may be appealed from by motion.

An addition to a decree cannot be made under the above rule, except as to something raised upon the pleadings.

The allowing proceedings to go on for a length of time under directions added to a decree, is not a bar to appealing against the order making the addition, but makes it incumbent on the Appellant to shew that there is a substantial error in the addition, and is to be considered on the question of costs.

THIS was a motion by the Plaintiffs, by way of appeal, to discharge an order made by Vice-Chancellor *Stuart* in Chambers directing additional accounts to be taken.

The suit was a suit to administer the estate of *Edward Foster*, who died in June, 1843. The Plaintiffs were the executors of *John Foster*, a son and partner of the testator, who had died in 1862. The testator's will empowered *John Foster* to take the testator's share in the partnership business at a valuation. The bill alleged that *John Foster* had duly accounted with the testator's executors for the testator's share in the business, and that nothing was due from *John Foster's* estate in respect of it. The bill was supported by an affidavit echoing its statements. A common decree was made on the 12th of December, 1863, for the administration of the testator's estate, no inquiries or accounts being directed with respect to anything being due from *John's* estate in respect of the partnership business. Another bill had been filed at the Rolls for the administration of the same estate, which alleged that the estate of *John Foster* was indebted to that of the testator in respect of the partnership, but the proceedings in that cause were stayed.

On the 12th of April, 1864, some parties who had been served with notice of the decree applied, under 15 & 16 Vict. c. 86, s. 42, rule 8, to add to the decree, and obtained the following order:—

"That, in addition to the accounts and inquiries directed by the said decree bearing date the 12th of December, 1863, the following further accounts be taken (that is to say): 1. An account of all receipts and payments, dealings and transactions between *Edward Foster* deceased, and *John Foster* deceased, up to the death of the said *E. Foster*, in respect of the partnership business in the Plaintiff's bill mentioned, not disturbing any settled account. 2. An account of the receipts and payments, dealings and transactions of *John Foster* deceased, and of the Plaintiffs, his executors, since his decease, subsequent to the death of the said testator, *E. Foster*, in respect of the said business as carried on as well during the life of as after the decease of the said testator, *E. Foster*, and such accounts are to be taken upon the footing of the estate of the said *E. Foster* being entitled to share in the profits derived from the carrying on of the said business after his decease."

This order, on the face of it, purported to be made upon hearing the solicitors for the Applicants, and for the Plaintiffs and Defendants, and upon reading the decree and the bill filed at the Rolls, but did not appear to have been made upon any evidence, and it was not alleged that any had in fact been adduced.

In July, 1867, after proceedings had gone on for some time in Chambers under this order, the Plaintiffs moved before Vice-Chancellor *Stuart* to discharge or vary it, and the motion was refused with costs.

The Plaintiffs now moved to discharge the order of the 12th of April, 1864.

Mr. *Wickens*, for the Appellants:—

What we complain of is that this order decides an important question against us without evidence. There was ground on the pleadings for an inquiry, but nothing more. This order assumes the result of such inquiry to be that the trade was carried on after the testator's death in such circumstances that his estate is entitled to share in the profits.

[The LORD JUSTICE ROLT:—Has it ever been decided whether the addition to the decree must be made only on the existing materials, or whether a fresh case may be made?]

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That is an important point, on which *Mutter* v. *Hudson* (1), has some bearing, but which has never been decided. I should submit that no fresh case can be made, for that a decree cannot be made on points not raised in the pleadings. A motion is the proper way of appealing against the order.

Mr. *Little*, Q.C., and Mr. *Charles Hall*, for the parties who had obtained the order:—

This order has been added to the decree, and become part of it, and cannot be disturbed without a petition of appeal: 15 & 16 Vict. c. 86, s. 42, rule 8; Cons. Ord. XXIII. r. 18, XXXI. r. 8, XXXV. r. 19. The decree must be deemed one, and you cannot have part of it liable to appeal by motion while a petition of appeal is necessary as to the rest. If an order of this kind can be re-heard on motion, it may be re-heard *ad infinitum*.

[The LORD JUSTICE ROLT referred to *Nelson* v. *Booth* (2).]

That case is not under the same section of the Act. Then on the merits such an order required no evidence, for it lies on the Plaintiffs to shew that *John Foster* took the testator's share at a valuation; and in the absence of evidence that he did so, the order is right, and we might have obtained it at the hearing if we had been there to ask for it. The Plaintiffs are precluded by delay from objecting to the order after it has been acted upon for more than three years.

Mr. *Berkeley*, for the executors of *Edward Foster*.

Mr. *Wickens*, in reply:—

It is out of the question that an order like this should be treated as anything but an order on summons, and liable to appeal as such. The delay is merely a question of costs. We do not object to an inquiry. Our objection to this order is, that it prejudges the case.

SIR JOHN ROLT, L.J.:—

In this case, a question of some importance as regards the practice of the Court has been raised, it having been contended that under the Act, 15 & 16 Vict. c. 86, s. 42, rule 8, and the General Orders of the Court relating thereto, an addition made to a decree subsequent to its date becomes part of the decree for every purpose, and can only be appealed from or varied in the same way

(1) 2 Jur. (N. S.) 34. (2) 3 De G. & J. 119.

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as the original decree. I am not able to come to that conclusion. It is, I think, obvious that any addition to a decree must keep itself within the pleadings, nothing must be added that is not fairly in issue in the cause or raised upon the pleadings, and regard must be had to that as strictly in adding to the decree as at the original hearing of the cause. I apprehend that the general nature of an addition to a decree will be adding inquiries and directing accounts in administration suits. If the seven rules of the 42nd section which precede the rule in question are referred to, it will be found, I think, that they chiefly refer to administration suits. It was in administration suits that difficulties arose from the necessity of having all the residuary legatees before the Court, and the first eight rules of the 42nd section appear to have been introduced with an especial view to suits of that kind. The practice is now settled that in such suits inquiries and accounts can in many cases be directed without any preliminary evidence, since the will of the testator, which is admitted, will suggest to the parties, or if they differ, will enable the Court to determine, what accounts and inquiries shall be directed, and although I by no means say that the power given by the 8th rule is confined to making additions of this nature, yet I think that additions of that kind were primarily contemplated by that rule. It may, however, be right (though it is unnecessary now to decide the point) that in some cases an addition should be made to a decree which shall determine rights, and if so, of course the person coming in for the first time would be at liberty to give evidence, and that evidence must be met and dealt with. It is not, however, necessary to enter into that question in the present case. I think it is clear that the primary object of the rule was to enable the Court to direct inquiries after the decree, and so to save the necessity of bringing additional parties before the Court at the hearing for the mere purpose of asking for inquiries which might be as well directed afterwards. Then that being the general object of the rule, I think it obvious that when additions have been made to a decree questions may arise upon them quite different in character from the questions which arise on the merits of the decree itself,—has the practice with reference to adding to a decree been rightly pursued?—is this a subject upon which it is right that an addition should be made? These are

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matters which may sometimes be completely independent of the merits of the original decree, and I think it would be very inconvenient to divide the questions that may arise upon an application to add to a decree, and to say that the order, so far as the Court below refuses to make the additions, may be appealed from by motion, but so far as additions are made can only be appealed from upon a petition for rehearing. On the other hand, I think that there is no practical inconvenience in allowing the whole question as to the merits of an application to add to a decree, which addition is to be made by a motion, or by an application in Chambers, to be considered upon a motion by way of appeal. It was urged that such a course might lead to alterations from time to time being made *ad infinitum*. I think there is no substance in that objection. The application having been made, having been granted or refused, and heard upon appeal, the matter is disposed of and parties will not be allowed to reopen it. Of course any person might make a frivolous application for that purpose, but it would at once be refused as being an attempt to disturb what had been conclusively settled by the Appellate Court. If new additions are proposed they will stand or fall on their own merits, and applications of that kind do not support the suggestion of alterations *ad infinitum*. I think that the 8th rule of the 42nd section does not point out in what way the application to add to a decree shall be made. It leaves that to be settled by practice. It has been found that it may conveniently be made by a motion, or by a summons in Chambers. It appears to me necessarily to follow that if there is no order or practice to the contrary the appeal should also be by motion. This view is supported by *Nelson* v. *Booth* (1), in which there was practically an addition to the decree, although it was not made under this section of the Act, and no suggestion was made by the parties, or by the Court, that it was inconvenient to have the question disposed of on motion. Under these circumstances I think the application to the Court of Appeal is rightly made by motion.

The next objection urged by the Respondents is the great delay that has taken place since the addition was made, and the great inconvenience of now re-opening the matter after proceedings have been had under the order. No doubt this is a very important

(1) 3 De G. & J. 119.

consideration, but I do not think that it is a bar to the application. Objections of this kind were frequently made in my early experience where complicated accounts and inquiries directed by decree had been prosecuted in the Master's offices, and, after years of enormous litigation and vast expense, and even after the cause had been heard on further directions, an appeal was brought from the original decree, alleging that those accounts and inquiries ought never to have been directed. The having allowed the decree to be prosecuted so long was always dealt with as being merely a question of costs. It was never, in my recollection, although I have frequently been on one side or the other in such cases, held that the thus allowing the accounts and inquiries to be prosecuted so long without objection was a bar to appealing against the original decree. I think, therefore, that though care must be taken to provide for the expenses incurred, the fact that the accounts have been prosecuted so long is not a sufficient objection to my dealing with the order, though, no doubt, the delay makes it more important to consider whether the error complained of in the addition to the decree is serious and substantial. I think it is right to say that in such a case it must be shewn that there is some substantial error in the addition. In this case the addition does not direct inquiries to be made, but accounts to be taken; and there is a declaration that such accounts are to be taken on the footing of the estate of *Edward Foster* being entitled to share in the profits derived from the carrying on of the business after his decease. Upon what evidence is that right declared? It is distinctly put in issue by the bill, which alleges that there is nothing due to the testator's estate from the estate of *John* in respect of the partnership, but there is not a word of evidence upon the subject. The Respondents to this motion tendered no evidence upon it at all. They say there was no evidence by the executors of *John* upon the subject; and, judging by the introductory part of the order itself, that would seem to be true; but the application itself proceeds without any evidence of any kind, and in direct opposition to the issue raised in the bill; and the order made without evidence declares the right in opposition to the allegations in the bill. Can that be sustained? It is said that the form of the addition may be sustained on the statements of the bill itself, the executors of *John*

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not having adduced any evidence to shew that the option of purchase was exercised. I do not concur in that view. I think it was not necessary for them, in bringing on the cause for hearing, to file any affidavit, or, at all events, any affidavit further than one echoing the bill. The Court then, consistently with its practice, would, if any party had asked for it at the hearing, have directed an inquiry whether *John* ever exercised the option, and whether the executors of the testator duly discharged him or not; but an affidavit having been filed echoing the bill, I think it would have been a manifest oversight to make a decree contrary to the allegation in the bill without one particle of evidence to negative that allegation; and the same reasoning applies to the addition which has been made. There is so much substance in the point, that, notwithstanding the delay that has occurred, I think it is imperative on me to vary the order appealed from. The order I propose to make is to direct an inquiry whether the testator's son *John* ever, and when and in what manner, exercised the option given him by the testator's will of taking the testator's share of the partnership business at a valuation, and whether the testator's son *John* ever, and when, thereby, or in any other and what manner, discharged himself of liability to the testator's estate in respect of the testator's share in the partnership business. If he did not, the accounts which the Vice-Chancellor has directed will be taken; but the declaration as to the footing on which they are to be taken must be omitted.

As regards the costs, the present application, after such delay, must be regarded as one for indulgence; and I think that the costs, both before the Vice-Chancellor and here, must be paid by the Appellants. As regards the costs of the proceedings which have been had under the order appealed from, if the inquiry which I direct is answered in favour of the Appellants, they must pay the Respondents' costs of those proceedings; but if *John* had not discharged himself from liability to the testator's estate, those proceedings will be useful, and the costs of them will be dealt with by the Vice-Chancellor in the ordinary course.

Solicitors: Messrs. *Williamson, Hill, & Williamson;* Messrs. *N. C. & C. Milne;* Messrs. *Emmet, Son, & Emmet.*

BLOXAM *v.* METROPOLITAN RAILWAY COMPANY.

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Feb. 13, 15, 16, 18.

Railway Company—Ultrà vires—Dividend out of Capital—Auditor's Powers—Injunction—Bonâ fide Shareholder.

A railway company whose original line was constructed and at work, obtained powers and money for the construction of an extension line, the shareholders in which were not to have more than 6 per cent. for the first three years, and afterwards were to have their shares amalgamated with the ordinary stock of the company.

The directors had in former half-years charged to capital one-half of the office expenses, and also a sum representing interest on debentures issued for lines in construction; they had also paid interest on the *Extension* share capital out of a sum of money paid by contractors as interest in respect of unfinished lines; and a dividend on the ordinary stock had been declared accordingly:—

Held, by *Wood*, V.C., on the application of a holder of shares in the *Extension* line, that the directors were wrong in all these charges, and that an interlocutory injunction must issue to restrain them from declaring a dividend calculated accordingly.

Held, by Lord *Chelmsford*, L.C., on appeal:—

That whether the half of the office expenses was or was not rightly charged to capital, no interlocutory injunction could be granted on that ground, inasmuch as the balance carried over to the next half-year on the revenue account was much larger than the sum so charged:

But that it was doubtful whether interest on debentures issued for lines in construction could be charged to capital:

That it was doubtful whether it was right to pay interest on the *Extension* capital out of the money received from the contractors:

That the questions were not concluded by the certificate of the auditors under 30 & 31 Vict. c. 127, s. 30:

That these were not merely matters of internal management, and that the Court would interfere in such cases if the directors were acting *ultrà vires*:

And that the questions were of such importance and doubt that the injunction must be continued till the hearing.

The Plaintiff had bought his shares a short time before the bill was filed, and to enable him to file the bill:—

Held, that he was not for that reason, or for the reason that these charges had been acquiesced in by the shareholders on former occasions, prevented from obtaining an interlocutory injunction.

BY an Act passed in 1854 (17 & 18 Vict. c. ccxxi.), the *Metropolitan Railway Company* was incorporated, and authorized to make a railway from *Paddington* to the *General Post Office*, with certain branches, and the Act provided, sect. 196, "That it shall not be

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lawful for the company out of any money by this Act or any other Act relating to the company authorized to be raised by calls in respect of shares, or by the exercise of any power of borrowing, to pay interest or dividend to any shareholder on the amount of the calls made in respect of the shares held by him in the capital by this Act authorized to be raised."

The *Companies Clauses Consolidation Act* (8 Vict. c. 16), was incorporated with this Act, by sect. 120 of which it is provided, that previously to every ordinary meeting the directors shall prepare a scheme shewing the profits, and proposing a dividend for the past half-year; and by sect. 121 it is declared that the company shall not make any dividend whereby their capital stock will be in any degree reduced.

By an Act (27 & 28 Vict. c. cccxv.) called the *Metropolitan Railway* (*Tower Hill Extension*) *Act*, 1864, powers were given to make an extension of the railway from *Moorgate Street* to *Tower Hill*, and by sections 26 and 28 the company was authorized to raise any further sums not exceeding in the whole £700,000 by the creation of new shares in their undertaking, and such shares were to be called *Extension* shares, and might be issued as a separate capital charged upon the profits of the *Extension* railway, or might be raised as new shares or new stock in the capital of the company; and the company were authorized by resolution to define the terms on which such *Extension* shares should be created, and might direct the application of the profits of the *Extension* railway, and might limit the amount of dividend, and provide for the ultimate amalgamation of the original capital and the *Extension* shares, and the company were empowered to borrow any sum not exceeding £233,000 under certain provisions and restrictions; and by sect. 32 all moneys which the company were authorized to raise by new shares or on mortgage, were to be applied only to the purposes of the said Act: the Act also contained a clause similar to sect. 196 of the Act of 1854.

By resolutions passed at a meeting of the company in February, 1865, under powers in the Act, the *Extension* shares were created in £10 shares in the company, and it was declared that the holders of *Extension* shares should not be entitled to receive any dividends out of the profits of the undertaking until December, 1866, and

from that time should be entitled to dividends in common with the holders of existing ordinary stock, but limited in their case for the first three years to the rate of £6 per cent. per annum: that on the 1st of January, 1870, the *Extension* shares should be converted into stock, and amalgamated with the ordinary stock of the company.

The *Extension* shares, under this and other similar Acts for other extensions, were accordingly issued and taken up.

An agreement was made in 1866 between the company and Mr. *Kelk* and others, whereby Mr. *Kelk* agreed to construct the *Tower Hill Extension Railway* for £383,000, and £80,000 for stations, and the agreement contained the following clause:—

"The railway and station works, as before defined, and all consequent, contingent, and incidental works, are to be completed within, on, or before the 31st day of December, 1867; and in order to secure the punctual completion of the said railway and works, and in lieu of all penalties for the non-completion thereof within the prescribed period, the contractors shall, until the said railway be completed and opened for traffic, pay to the directors such sums of money as shall be equivalent to interest upon so much of the sum of £700,000 (being the share capital created in respect of the said railway) as shall from time to time be called and paid up at the respective times and the rates following (that is to say):—For and on each of the four half-years ending respectively the 30th day of June and the 31st day of December, 1865, and the 30th day of June and the 31st day of December, 1866, at the rate of £5 per cent. per annum; and for and on every subsequent half-year thereafter at the rate of £6 per cent. per annum; and in case the said railway shall be completed and opened for traffic during any such subsequent half-year the contractors shall, on the completion and opening for traffic thereof, pay to the directors such sums of money as shall be equivalent to interest at the rate of £6 per cent. per annum upon the share capital so called and paid up as aforesaid for such a number of days as shall elapse between the last preceding half-year and such completion and opening for traffic. If in the opinion of the engineer there shall be any such delay in the delivery of possession of the land by the company as shall render it impracticable to complete and open the railway by the 31st day of December, 1867, such allowance in

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respect of interest shall be made by [*sic.*] the contractors as shall be equivalent to the interest payable by them for the period of the delay so occasioned."

On the 31st of July, 1867, the directors issued their report for the preceding half-year. The statement of accounts accompanying the report contained a capital account and revenue account.

The debtor side of the capital account consisted of the following items:—

	£.
"Consolidated Capital of £1,800,000 . .	1,799,909
£5 per Cent. Preference Capital, £300,000 .	300,000
Extension Share Capital of £1,900,000 . .	1,867,994
Debenture Capital of £1,333,333 . . .	1,255,283
Temporary Loans	60,000
	£5,283,186

And amongst the items on the creditor side were: "Interest on loans, and proportion of debenture interest chargeable to capital, £8799;" "Office expenses, £3108, less one-half charged to revenue, £1554."

The debtor side of the revenue account shewed receipts from balance, traffic, rents, interest on balances, and transfer fees—total, £132,613.

The creditor side of the revenue account consisted of the following items:—

	£.
"Working Expenses	41,350
Compensations	1,750
Proportion of Office Expenses	1,554
Annuities	125
	44,779
Interest on £449,330 Debenture Capital . .	10,110
Dividend on £300,000 Preference Stock . .	7,500
Dividend on £1,800,000 Consolidated Stock, at 7 per cent.	63,000
Balance carried to next account . . .	7,224
	£132,613"

It did not appear on the account how the interest on the *Extension* share capital of £1,900,000 was paid, but it seemed to have been paid out of the interest received from Mr. *Kelk* under his contract, which also did not appear in the account.

The auditors certified the accounts in the usual form pursuant to 30 & 31 Vict. c. 127, s. 30.

The half-yearly meeting of the company was held on the 7th of August, and at that meeting Mr. *Parson*, the chairman of the company, in moving that the report and accounts be received and adopted, said that "the £449,330 stated in the accounts as debenture capital, on which interest was charged to revenue, was not the whole debenture capital, but was the whole raised in respect of those portions of the line which were productive of any return. The directors would endeavour in a short time to take care that the division of office and general expenses partly charged to capital and partly to revenue should be charged to revenue. The directors wished to do it, but the shareholders would see that, in an undertaking such as the *Metropolitan* was, its traffic growing with great rapidity, although comparatively small at the outset, they could not afford to pay large dividends and put every one of these charges to revenue. The expenses of the direction were, in a great measure, the result not of the old undertakings, but of the new ones. The dividend on the 6 per cent. *Extension* stock had been paid as usual, and the proprietors knew what that was. They had received from the contractor every half-year the amount necessary to pay that dividend, and should continue to do so until the line was opened. They put that fund aside, and meant to pay that dividend in January. They also wanted £855,000 for new works, and proposed to raise £600,000 in new redeemable shares."

In January, 1868, the directors issued warrants for dividends at 6 per cent. on the *Extension* capital, which were afterwards paid in cash to the holders.

The Plaintiff in this case was connected with the *Stock Exchange*, and on the 13th of December, 1867, he published an advertisement in a newspaper, addressed to the holders of *Metropolitan Extension* stock, stating that the directors were paying an extra dividend out of capital to the holders of the old stock, which was defrauding the holders of *Extension* stock, and that an application on the subject

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was about to be made to the Court of Chancery by a few shareholders, and those concurring were requested to send their addresses to *F. W. Bloxam*, the Plaintiff.

On the 28th of December, 1867, the Plaintiff purchased £500 *Extension* stock for £525, not having been previously a shareholder. The stock was transferred to him on the 15th of January, 1868, and the 6 per cent. dividend had been paid upon it.

On the 25th of January, 1868, the Plaintiff filed the bill in this suit on behalf of himself and all other the shareholders of the *Metropolitan Railway Company*, ordinary, preference, and extension, except the Defendants, against the company and the directors, charging that the company had, for the purpose of increasing the sum represented as available for dividends, charged sums on the capital account which were properly payable out of revenue, and had for the same purpose included in the debtor side of the revenue account sums which ought properly to have appeared in the capital account, and had inserted on the debtor side of the revenue account sums paid as interest by Mr. *Kelk*, which sums were paid by him in consideration of sums paid or to be paid to him out of capital: that the company had raised nearly all the capital authorized to be raised for the *Tower Hill Extension*, but had no intention, unless they could obtain money from other sources, of constructing the works of that extension. And the Plaintiff prayed declarations that no dividend ought to have been declared as above mentioned, and for an injunction, and accounts, and consequent relief.

On the 28th of January, the Plaintiff moved for an injunction, the directors having in the meantime issued a report, and proposed a 7 per cent. dividend for the then past half-year, carrying over a balance of £6998 on revenue to the next account.

The accounts were prepared on the same principles as the former accounts, except that £57,000 appeared on the debtor side of the revenue account as "amount received from Mr. *Kelk*," and £57,000 on the creditor side as "dividend on £1,900,000 *Extension* capital at 6 per cent."

The Defendants, by their affidavits, said that the company had three years within which to make the *Tower Hill Extension*, and had sufficient money to make it with; that the arrangement with Mr. *Kelk* had been made by the directors, and explained to the share-

holders at several meetings, and acquiesced in; that the plan of charging interest on loans for works in construction to capital was universally adopted, and had always been adopted in this company; that there were speculators on the *Stock Exchange* who were trying to depreciate the shares, and that the Plaintiff was one of them.

The Plaintiff, by his affidavits in reply, said that the stock held by him was *bonâ fide* his own, and that he was not indemnified against the costs of the suit, and that he was not instigated by any one except holders of the same stock, and he denied that he was a speculator or concerned in jobbing; and he said that a holder of £4500 extension stock supported him.

The Vice-Chancellor *Wood*, before whom the motion was made, granted an injunction (1), and the Defendants moved by way of appeal to discharge that order.

(1) 1868. Jan. 31. SIR W. PAGE WOOD, V.C.:—

The first question to be considered was, as to the position of the Plaintiff. Before he was a shareholder he published an advertisement for shareholders to come forward and take proceedings, but having failed to get any one, he himself purchased £500 stock in order to be able to institute this suit. It was said that in such cases the Court would refuse to lend its assistance, though the proceedings of the company might be illegal, and the case of *Forrest* v. *Manchester, &c., Railway Company* (7 Jur. (N. S.) 887) and others were cited as authorities. But in *Forrest's Case* the Lord Chancellor considered that the Plaintiff was not a real shareholder, and was merely the puppet of another company, and the Lord Chancellor referred to the judgment of Lord *Langdale* in *Colman* v. *Eastern Counties Railway Company* (10 Beav. 1). But the Court had not gone beyond this in refusing relief, and here it could not be said that the Plaintiff had not a substantial interest in the company, though he might have other motives which could not be approved of. He was also supported by a holder of £4500 stock, and it did not appear that he was indemnified by any one. Under these circumstances he must be entitled to stand in the position of any other shareholder who chose to institute such a suit.

It was also argued that in the price he paid he had accepted a dividend, and could, therefore, not complain, but that would no more prevent his taking these proceedings than did the conduct of the shareholder in *Hoole* v. *Great Western Railway Company* (Law Rep. 3 Ch. 262). It did not follow that because a man had allowed a great portion of his property to be destroyed, he was bound to allow the remainder to be destroyed.

It was said that time ought to be allowed for investigating the case, but the chairman at the meeting was aware of all the questions, except, perhaps, as to the payments by Mr. *Kelk*.

Then, as to the merits of the case. The charge to capital of half the office expenses was indefensible. The officers of the company were not unaware of this, for the chairman at the meeting said that it was impossible to pay large dividends and put every one of these

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Sir *Roundell Palmer*, Q.C., in support of the motion to dissolve:—

First: The order is irregular, as containing a declaration of opinion on an interlocutory application, which may embarrass the Court at the hearing. Secondly: The Court will not grant an in-

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charges to revenue. That seemed to be the secret of all which had happened. The defence was that these expenses were chargeable not only on the working line, but on the incomplete lines. No doubt the directors were in a painful position between two classes of shareholders, one permanent, and the other temporary speculators, who abhorred anything like a diminution of dividends, and would agree to any amount of dividend. But this could not last for ever, and companies could not go on always paying dividends out of capital. The Legislature had attempted to provide against this by saying, in sect. 121 of the *Companies Clauses Consolidation Act*, that dividends should not be paid out of capital in any shape.

Then as to the question under *Kelk's* contract. He had contracted to do certain works, and until completion to pay so much as would produce a dividend to the shareholders during such time as the works should not be completed. But he of course stipulated that if there was any delay on the part of the company, then the engineer should certify to that effect, and the dividend would not be payable during that time. It appeared, however, that these works had not been touched, and it was preposterous to suppose that Mr. *Kelk* would agree to pay this interest irrespective of the sum which he was to receive. He might recover these very sums if it appeared that the delay was on the part of the company. Still it was conceivable that, having regard to the state of the money market, a contractor might agree to pay such a penalty. It was also said that further information could be given, and that altogether this matter was too dubious to issue an injunction upon. The company ought, however, to have every opportunity of considering well, before they ventured to declare a dividend upon this. Of course Mr. *Kelk* would bring it into his account, and make it a charge, and it could not be considered income.

As to the charge of interest on the debentures, could there be a serious doubt about it? As to debentures to the amount of £449,330, interest was paid upon them out of revenue, but the directors said that they would not so charge the interest on the £900,000 debentures in respect of unfinished lines, and would charge it upon capital, and thus a dividend was declared as from profit, although all this interest must remain a charge upon the capital of the company. This remained unexplained at present, and His Honour could not see the principle upon which it was done.

As to the effect of the 30th section of the Act of 30 & 31 Vict. c. 127, it was not argued that the signature of the two auditors was conclusive upon any Court as to the accuracy of the accounts, and the section could not exclude the rights of the shareholders to see whether what was being done was not *ultrà vires* on the face of it. For instance, in this case it could not be held that the certificate of the auditors as to the office expenses excluded all investigation. It appeared to His Honour, therefore, that an injunction ought to be granted to stay the payment of the dividend, prefaced by a declaration that these expenses had been improperly charged.

terlocutory injunction, which will cause great injury to the shareholders, whilst withholding it will do very little injury to the Plaintiff. Thirdly: The Plaintiff has only bought these shares in order to institute this suit, and not *bonâ fide*. Fourthly: The Plaintiff seeks to disturb an arrangement always acted upon and acquiesced in by the shareholders, including the shareholder from whom he purchased. Fifthly: The interference of the Court is not warranted by any Act, and is directly in the teeth of an Act passed to meet the case (1). Sixthly: The Court is not in the habit of interfering in such cases. Seventhly: The directors were quite right in what they did.

As to the £1554, the moiety of the office expenses, the directors considered it fair to charge part to capital; but whether they were right or not cannot signify on this occasion, as a far larger sum is carried over as balance to the next account, and the dividend might equally be declared if this sum were all charged to re-

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The following order was made:—

"This Court being of opinion that one moiety of the charges for the directors, and auditors, and office expenses, has been improperly charged, on former occasions of dividends being declared, to capital account, and that interest on the difference between £449,330 and £1,331,320 debenture capital is not, nor is any part thereof, properly chargeable to capital account, and that the statement and account issued by the directors this day is founded upon accounts making the same charges to capital account, and the Plaintiff undertaking, &c., this Court doth order that an injunction be awarded to restrain the company and the directors from declaring or paying any dividend except so far as the profits and other income of the company may be applicable to such dividend, regard being had to the provisions of the special Acts authorizing the several undertakings of the company, and those of the *Companies Clauses Consolidation Act*, until the hearing of the said cause, or until further order."

(1) 30 & 31 Vict. c. 127, s. 30:—"No dividend shall be declared by a company until the auditors have certified that the half-yearly accounts proposed to be issued contain a full and true statement of the financial condition of the company, and that the dividend proposed to be declared on any shares is *bonâ fide* due thereon after charging the revenue of the half-year with all expenses which ought to be paid thereout in the judgment of the auditors; but if the directors differ from the judgment of the auditors with respect to the payment of any such expenses out of the revenue of the half-year, such difference shall, if the directors desire it, be stated in the report to the shareholders; and the company in general meeting may decide thereon subject to all the provisions of the law then existing, and such decision shall for the purposes of the dividend be final and binding; but if no such difference is stated, or if no decision is given on any such difference, the judgment of the auditors shall be final and binding."

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venue. Money raised by loan is not capital within the meaning of sect. 121 of the *Companies Clauses Consolidation Act*, and the Legislature has left these, as matters of internal management, entirely to the shareholders: *Foss* v. *Harbottle* (1); *Browne* v. *Monmouthshire Railway and Canal Company* (2). It may be foolish to borrow money and declare a dividend out of it, but that is all. The course pursued by this company has been adopted by every company for forty years, and this is the first time that any attempt has been made to induce the Court of Chancery to act as auditor. The company may manage its affairs foolishly, but the Court of Chancery will certainly do it worse. The Act of last session seems to have been passed in anticipation of such suits as this, and to prevent speculators from making these mischievous attempts to ruin companies. None of the Acts say that interest shall not be paid out of borrowed money on works in construction. As a matter of account, it is clear that interest on money spent must be charged on the works in construction, although they produce nothing, and unless this is done, it would be impossible to get anyone to take shares in a new line. On any other system it would be impossible for an existing company to construct a new line, as their own dividends would be absorbed for years in paying dividends on the capital for the unfinished line, and it is certain that the Legislature never intended such an absurdity. At all events, the Court will not grant an interlocutory injunction at the instance of such a Plaintiff, who bought his shares for the express purpose of instituting the suit: *Saunders* v. *Smith* (3); *Rogers* v. *Oxford, Worcester, &c., Railway Company* (4); *Forrest* v. *Manchester, Sheffield, &c., Railway Company* (5); *Seaton* v. *Grant* (6); *Filder* v. *London, Brighton and South Coast Railway Company* (7). No creditor or debenture creditor complains, and only one or two other shareholders support the Plaintiff.

Mr. *G. M. Giffard*, Q.C., with Sir *Roundell Palmer*:—

No one denies that this dividend has been earned, the only

(1) 2 Hare, 461.
(2) 13 Beav. 32.
(3) 3 My. & Cr. 711.
(4) 2 De G. & J. 662.
(5) 7 Jur. (N.S.) 887.
(6) Law Rep. 2 Ch. 459.
(7) 1 H. & M. 489.

question is how the money is to be applied. Unless interest is paid on a line in construction, it is not, in fact, charged with all that it has cost, and if it is several years in construction the amount becomes very material. If the company borrowed money from time to time to make the line with, the company would have to pay the interest. The revenue of the old line is not to be taken to construct the new line. At all events, where such a practice is universal, and has been pursued for years, is the Court to interfere *brevi manu*, and say it shall not be done? The Court will not interfere with the internal management of a company unless the acts proposed are actually illegal: *Simpson* v. *Westminster Palace Hotel Company* (1). Would the Court entertain the question whether the line was in a bad state and the money ought to be spent in repairs and not in dividends? Besides other objections to this Plaintiff, he has received his 6 per cent. either actually or in the price he has paid for his stock, and now he comes and complains. As to the bargain with *Kelk*, such arrangements are common. Instead of imposing penalties on a contractor for not finishing the line, an agreement is made with him that until it is finished he will pay interest to the shareholders as if it was finished, and that is what has been done in this case.

Mr. *Bristowe*, on the same side.

Mr. *Amphlett*, Q.C., and Mr. *E. R. Turner*, for the Plaintiff:—

No company which is at work and earning profits can divide these profits as dividend unless all the outgoings have been paid, and interest on unfinished lines is certainly an outgoing. As to the Plaintiff, the *Extension* shareholders, who can only receive 6 per cent. for three years, will clearly be injured if during those three years the capital or debts are unduly increased in order to pay the other shareholders a larger dividend. It was, however, an invidious task to interfere, and as no one would do so, the Plaintiff at last came forward, as he had a right to do: *Colman* v. *Eastern Counties Railway Company* (2). As to the balance of inconvenience, if the dividend is once paid it can never be got back, but there is very little inconvenience in a delay in paying the dividend until

(1) 8 H. L. C. 712; 6 Jur. (N.S.) 985. (2) 10 Beav. 1.

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the question is settled: *Lloyd* v. *London, Chatham, and Dover Railway Company* (1).

This is not a case of internal management, for if we are right the directors are doing what is *ultrà vires*, and then the Court will interfere: *Carlisle* v. *South-Eastern Railway Company* (2); *Hoole* v. *Great Western Railway Company* (3). If a company is formed to make a railway, there is nothing in the Acts to prevent interest being paid whilst the line is being made, though there may be no earnings, but the moment earnings begin that must cease. If the company wish to make a second line, they may have a separate capital, and pay interest during construction, but if they choose to do it by means of additional capital, then that additional capital can only rank with the old capital, and receive dividend out of earnings; or if they choose to make the line with borrowed money, the interest must be paid out of the earnings. Under the general Act, a company is not entitled to charge any portion of interest on capital, whether productive or not, and under the special Acts, sect. 196 of the first Act expressly prohibits it: *Macdougall* v. *Jersey Hotel Company* (4). We say that the money raised for the *Tower Hill Extension* has not been spent upon it, but diverted to other purposes, and, in fact, it is not in construction, and has not even been begun. As to the Act of last session, that only prescribes a mode of settling any dispute between the auditors and directors, but does not legalise anything actually *ultrà vires*. As to *Kelk's* contract, it is not easy to understand the arrangement, but it is clear that if this payment is to be charged to capital, it ought not to go to revenue. As to our vendor's assent to such proceedings on former occasions, there is no proof that he or those through whom he claims were aware of them. If we have received the dividend, we could not tell whether it was more or less than it ought to be.

Sir *R. Palmer*, in reply.

Feb. 18. LORD CHELMSFORD, L.C.:—

This is not the occasion upon which I can be called upon to pronounce a definitive judgment upon the important questions raised

(1) 2 D. J. & S. 568, 579. 11 Jur. N.S. 888
(2) 1 Mac. & G. 689.
(3) Law Rep. 3 Ch. 262.
(4) 2 H. & M. 528. 10 Jur. N.S. 104

in this case, nor are there materials before me which would enable me to form a satisfactory opinion upon them. All that I am called upon to consider upon this appeal is, whether there are doubtful questions of importance to be determined in the case, and if there are, whether the proceedings of the company with reference to the matters in dispute between the parties ought, or ought not, to be suspended until the hearing.

It is said on the part of the Defendants, that the evidence in the case is extremely meagre; and, probably, for the final determination of the disputed matters it is so. But for the purpose of to-day there is quite enough to shew the nature of the questions which will ultimately have to be decided. If it should appear upon what is at present before me, either that the proceedings of the company can be completely justified, or that for any reason the Court has no power to interfere with them, it would be wrong to allow the injunction to stand. But if the questions are not only doubtful, but of great importance, and if the hands of the Court are not fettered, then it will be necessary to consider whether there is any ground for refusing the injunction, either on account of any personal exception to the Plaintiff, or upon the ground of the inconvenience which the injunction must occasion exceeding the mischief which would be sustained by the Plaintiff, and those whom he is said to represent, from permitting things to take their course until the hearing.

The questions which will ultimately have to be decided are these:—

First: Whether the office expenses, and the fees of the directors and auditors, are properly charged, one moiety upon capital and the other moiety upon the revenue of the company.

Secondly: Whether the interest upon debentures ought to be charged upon capital, instead of upon revenue.

Thirdly: Whether the dividend paid to the *Extension* shareholders under the agreement with the contractors, Messrs. *Kelk*, can be justified.

Upon the first question, it is admitted that if it stood alone it would not be a sufficient ground for the injunction; for whether it is right or wrong to charge a moiety of the office expenses, and of the directors' and auditors' fees, to capital, the amount so charged

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is largely exceeded by the balance in the hands of the company, and therefore no injury can happen to the shareholders which requires the prompt intervention of the Court.

The second question, as to charging the interest of debentures upon capital, is a large and general question, and one of the greatest importance. The Vice-Chancellor has treated it as a question upon which there could be no serious doubt, and he has prefaced the injunction with the expression of an opinion that no part of the interest on the debenture capital is properly chargeable to capital account. I should be very unwilling, without necessity, to offer a single observation in opposition to an opinion of Vice-Chancellor *Wood*, which is always entitled to so much respect; but I am bound to say, without dissenting from that opinion, that the question does not appear to me to be so entirely free from doubt as His Honour supposed. There certainly is not to be found in any of the Acts of Parliament any express prohibition of the course adopted by the company. The prohibitions contained in the different provisions of the Acts which were referred to in the argument apply to share capital, and not to borrowed capital, with the exception of the 196th section of the Defendants' Act. That section does contain a prohibition against paying dividends out of borrowed capital; and the 120th and 121st sections of the *Companies Clauses Act*, taken together, seem to me to imply, if they do not express, that dividends can only be paid out of profits, and consequently not out of borrowed capital.

There has certainly been no direct payment of dividends out of capital in this case, but if the effect of paying the interest on debentures out of capital is to leave so much of the revenue to be applied to dividend, and the payment out of capital is improper, then it will be a question to be decided at the hearing whether it does not amount indirectly to the same thing as paying dividends at once out of capital, and if so, all the provisions of the Acts which prohibit such a course will be applicable to the present case.

But the question principally to be decided is this:—The Act of Parliament for making this *Extension Line* empowered the company to raise an additional capital, either to be issued as a separate capital charged upon the profits of the *Extension* railway, or as

new shares or new stock in the capital of the company. Now, if the *Extension Line* had been carried on as a separate undertaking, it is quite clear that, until the line was finished and was making profit, the expenses of the undertaking must have been a charge upon the capital, whether arising from shares or derived from the borrowing powers of the company. But, under the provisions of the Act, it was resolved that the requisite capital for the *Extension Line* should be raised as portions of the general capital of the company by the creation of new shares, and consequently the *Extension Line* became part of the original undertaking. And then this question arises:—The *Metropolitan Railway Act*, 1864, authorizing this *Extension*, enacts "that all moneys which the company are, by the Act, authorized to raise by new shares or on mortgage shall be applied only to the purposes of the Act." Now, the *Extension Line* yielding no income, if the line were a separate undertaking, the interest of any debt incurred under the borrowing powers of the Act must have been charged upon capital; but the line having been made part of the general undertaking, which, as a whole, was yielding profit, the question which must ultimately be the subject of decision is, whether it can be considered to be a legitimate application of the moneys to be raised or borrowed for the purposes of the *Extension Act*, to charge the debenture debt, which belongs to the unexecuted portion of what is now an entire line, upon the capital of the undertaking, which, as a whole, is yielding revenue. The Vice-Chancellor may be right in saying that no part of this debenture debt is properly chargeable to capital, but I cannot treat it as a question upon which there can be no serious doubt.

The determination of this question bears upon all the objections which have been made to the interference of the Court; for the Defendants contend that, however improper may have been the conduct of the directors in this respect, what they have done is a matter entirely of internal arrangement, which, having been sanctioned by the shareholders, the Court will decline to disturb. But the matters of internal management which are beyond the province of the Court, were properly admitted to be such as are within the scope of the company's powers. If any acts are done which are *ultrà vires*, they must be subject to examination and

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control. If a company were generally to agree to violate the provisions of an Act of Parliament, they could not shelter themselves from scrutiny under the plea that they had a right to manage their affairs without external interference. If, therefore, the charging the interest on the debenture debt to the capital account was beyond the limits of the company's powers, the idea of its being matter of internal management has no foundation.

But (if I understand the argument) the Defendants' claim to protection from the interference of the Court, under the 30th section of 30 & 31 Vict. c. 127, goes much beyond this, and challenges for the certificate of the auditors a power to sanction charges which otherwise would be illegal. I cannot read the section in this sense. Suppose the interest upon debentures ought properly to be charged on revenue, and the auditors should either refuse to charge this interest upon the revenue of the half-year, or should charge it, and the directors should differ with them, and a general meeting of the shareholders should agree with the directors, can it be contended that in either of these cases the debentures could be made a charge upon capital contrary to law? Whatever may be the exact meaning of this section (which is not perfectly clear), it cannot, in my opinion, be intended to give the auditors power to transfer to capital any charge which properly belongs to revenue.

The third question, which must be determined at the hearing, relates to the dividend paid to the *Extension* shareholders from the moneys arising out of the agreement of the Messrs. *Kelk*, the contractors. It is said that these moneys are in lieu of penalties which would have been incurred by the non-completion of the works within the limited time, or, in other words, that they are the purchase-money paid by the contractors for the benefit of delay: if this is so, and the money is not afterwards to be refunded by the company, no objection could be made to the arrangement. But it is charged by the Plaintiff in his bill that the dividends so paid have been, or will be, repaid out of the revenues of the company. This is a fact to be ascertained upon the hearing, and it is obvious that this transaction will form another very material question in the case.

It being evident, therefore, that questions of importance, and not free from doubt, must arise at the hearing, it remains to be consi-

dered whether there are any reasons against the injunction either personal to the Plaintiff himself or by reason of his acquiescence in previous acts of the company similar to those which are the subject of the present suit, either by the Plaintiff or by the person from whom he purchased his stock, or owing to any great inconvenience which will arise from suspending the company's proceedings.

No one can possibly approve of the manner in which the Plaintiff introduced himself to the company. By some concert with *Extension* shareholders, the particulars of which have not been revealed, the Plaintiff comes forward in the assumed character of a holder of this description of stock, and invites combination and co-operation largely from the body of these shareholders. He then becomes a purchaser of £500 *Extension* stock receiving the benefit of the dividend out of the moneys furnished by the Messrs. *Kelk*, of which he now complains.

Very soon after his acquisition of shares he commences operations against the company by filing this bill.

However questionable the mode of the Plaintiff's introduction to the company may have been, he has an actual interest in the subject matter of the suit. In this respect he differs from the Plaintiff in the case of *Forrest* v. *Manchester, Sheffield, and Lincolnshire Railway Company* (1), who stated in his examination that the directors of a rival company directed the institution of the suit and indemnified him against the costs; and Lord *Westbury* dismissed the bill on the ground that the Plaintiff coming in the character of a shareholder in the company, and stating that it was not his own act, but an act that he had been directed to do by the other company, the suit was an imposition on the Court. The Plaintiff may properly be described, in the words of Lord Justice *Knight Bruce* in *Rogers* v. *Oxford, Worcester, and Wolverhampton Railway Company* (2), as a person who was made "a shareholder in the company for the mere purpose of instituting this litigation." But if the question put by Vice-Chancellor *Wood*, in *Filder* v. *London, Brighton, and South Coast Railway Company* (3), is repeated in this case: "Is the suit *bonâ fide* the Plaintiff's own suit, or is he merely the hand by which some one else acts?" the correct answer must be,

(1) 7 Jur (N. S.) 887. (2) 2 De G. & J. 662, 664.
(3) 1 H. & M. 493.

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that he consented to become the instrument of others, but for that purpose he has acquired an interest which gives him a common cause with them. I cannot say that having chosen to place himself in this invidious position with a real interest, though of no great amount, at stake he is not to have the ordinary rights of a Plaintiff on account of the motives which led him to acquire the means of appearing in that character.

But it is further objected against the Plaintiff that the proceedings of the company of which he complains have been going on for years with the full knowledge and entire acquiescence of the person from whom he purchased his stock, and, therefore, he cannot be heard to raise any objection to them. If the acts of the directors were positively illegal, the fact of knowing them, or even of deriving benefit from them, would not have prevented the original holder of the stock from afterwards objecting to similar acts. But it never can be held that the acquiescence of the original holder of stock in illegal acts of the directors of a company will bind a subsequent holder of that stock to submission to all future acts of the same character.

I was pressed very strongly as to the extent of mischief which it was said would be produced by affirming the decree for an injunction, compared with the slight inconvenience which would be occasioned by dismissing it, and I regret that any persons should suffer from having the dividend withheld from them if it should ultimately be found that they are entitled to it. But it must be remembered that if I allow the dividend to be received, and the Court should, at the hearing, determine that it was improperly declared, it will never be recovered (even if recoverable) from those to whom it will be paid; and in this sense the injury to the *Extension* shareholders may be not incorrectly described as irreparable.

I must, therefore, affirm the order and leave the costs to be costs in the cause, and as the declaration prefaced to the order has been made by a Judge of such great experience, I shall not interfere with it.

Solicitors for the Plaintiff: Messrs. *Tilleard, Son, Godden, & Holme.*

Solicitors for the Defendants: Messrs. *Burchells.*

In re NATAL INVESTMENT COMPANY.

L. C.
1868
Feb. 27;
March 2.

CLAIM OF THE FINANCIAL CORPORATION.

Assignment of Chose in Action—Debenture payable to Holder.

A company gave to *C.* debentures, by each of which the company undertook to pay to "*C.*, or to his executors, administrators, or transferees, or to the holder for the time being of this debenture bond," the sum therein mentioned, with interest. These debentures were given in pursuance of an agreement which provided that part of the price of land sold by *C.* to the company should be paid in debentures bearing interest, but did not say anything about the form of the debentures:—

Held, that there was nothing in the debentures to take them out of the ordinary rule, that the assignee of a chose in action takes it subject to all the equities between the original parties to the contract; and that the holders of these debentures could only prove on them subject to all equities between the company and *C.*

In re Blakely Ordnance Company (1) distinguished.

THIS was an appeal motion by the official liquidator of the *Natal Investment Company, Limited*, from an order of the Master of the Rolls, allowing the *Financial Corporation* to prove in their own names on certain debentures, irrespective of any equities between the company and the obligee named in the debentures. It was heard before Lord *Cairns*, when Lord Justice, but judgment was given by His Lordship after receiving the Great Seal.

In 1864 *Adolphe Coqui* agreed with the company to sell to them land in *Natal*. Part of the price was to be paid on the signing of the agreement, and the rest on completion, partly in bills and partly "by the delivery to the vendor or his nominees of debentures of the company carrying interest at the rate of £6 per cent. per annum, and bearing even date with the transfer of the estates; one half of such debentures to be payable at the expiration of two years, and the other half at the expiration of three years from the date thereof."

In February, 1865, *Coqui* wrote to the company, asking them to issue him some of the debentures at once, and stating that he was in a position to transfer the land at any moment. The company, accordingly, gave him debentures on the 11th of February, 1865,

(1) Law Rep. 3 Ch. 154.

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carrying interest from the 30th of June, 1865. These debentures were all similar in form, and one of them was as follows:—

"Whereas the *Natal Investment Company, Limited,* hereinafter designated the company, is indebted to *A. Coqui* in the sum of £500, now these presents witness, that in consideration of the premises the company hereby declares that the funds, assets, and property of the company shall be subject and liable for the same, and the company hereby undertakes to pay unto the said *A. Coqui,* or to his executors, administrators, or transferees, or to the holder for the time being of this debenture bond, the sum of £500 on the 30th of June, 1867, and to pay interest thereon at the rate of £6 per cent. per annum, from the 30th day of June, 1865, until payment of the said principal sum, such interest to be paid half-yearly at the principal office of the company for the time being in *London.* Provided also, that the payment of the said sum of £500, or other amount due upon this debenture bond, to the person presenting the same, shall be a good and sufficient discharge to the company from any claim or demand in respect thereof."

Four coupons for half-yearly instalments of interest were annexed.

Three of these bonds were deposited by *Coqui* with the *Financial Corporation* as security for money due. He wholly failed to carry out his contract with the *Natal Company,* having no title to the land he professed to sell. But it did not appear that the *Financial Corporation* had any notice of this.

The Master of the Rolls considered that the case was concluded by *In re Agra and Masterman's Bank* (1), and *In re Blakely Ordnance Company* (2); and made the order appealed from.

Mr. *Jessel,* Q.C., and Mr. *F. Kelly,* for the official liquidator:—

First, we say that these debentures, on the construction of them, did not purport to be payable to bearer; secondly, that if they did, the attempt was ineffectual, for that an instrument under seal payable to bearer cannot be made; thirdly, that the instruments were obtained by fraud, and being taken subject to all equities there is no claim upon them. The case of *In re Agra and Masterman's Bank* was a case of an agreement to accept negotiable instruments, and is wholly distinct from the present

(1) Law Rep. 2 Ch. 391. (2) Law Rep. 3 Ch. 154.

case. In the case of the *Blakely Ordnance Company* (1), there was an agreement on the formation of the company that instruments payable to bearer should be given. It was this agreement which bound the company to give them effect as such, and the Lord Justice *Rolt* intimated an opinion that otherwise the giving instruments payable to bearer would have been *ultrà vires*. Here the agreement was only to give debentures, nothing being said about their form. The instruments do not purport to be payable to bearer so as to enable the bearer to sue: In a case of *In re Nowgong Tea Company*, before the Master of the Rolls (Feb. 15, 1868), the company by their debentures covenanted as to interest to pay to the *bonâ fide* holder of the bond the sums mentioned in the coupons, and it was held that the right of the holders was subject to the equities between the obligee of the bond and the company. The law does not allow of such a thing as a bond payable to bearer: *Dixon* v. *Bovill* (2); *Hibblewhite* v. *M'Morine* (3); *Tayler* v. *Great Indian Peninsula Railway Company* (4); *In re Blakely Ordnance Company*.

Mr. *Bedwell*, and Mr. *Waller*, severally appeared for shareholders who had obtained liberty to attend proceedings, but had not joined in the appeal. They proposed to support the appeal, but the Court declined to hear them.

Mr. *Baggallay*, Q.C., and Mr. *Renshaw*, for the Respondents:—

On the construction of the debentures it is clear that the intention of the parties was that they should be assignable free from equities. There is no ground for contending that the directors in giving bonds payable to bearer were going beyond their powers. The articles give them power to issue bills of exchange and promissory notes, which are negotiable instruments, assignable free from equities, and bonds payable to bearer stand just on the same footing: *Hulett's Case* (5); *Woodhams* v. *Anglo-Australian Assurance Company* (6); *Watson* v. *Mid-Wales Railway Company* (7); *Aslatt* v. *Farquharson* (8).

Mr. *Jessel*, in reply.

(1) Law Rep. 3 Ch. 154.
(2) 3 Macq. 1.
(3) 6 M. & W. 200.
(4) 4 De G. & J. 559, 5 Jur. N.S. 1087.
(5) 2 J. & H. 306. 5 Jur. N.S. 357
(6) 3 Giff. 238. 6 Jur. N.S. 1276.
(7) Law Rep. 2 C. P. 593.
(8) 10 W. R. 458.

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Mar. 2. Lord Cairns, L.C., after stating the nature of the point in dispute, and the form of the debentures, continued :—

The decision of the Master of the Rolls allowing the *Financial Corporation* to prove irrespective of any equities as between *Coqui* and the *Natal Investment Company* was founded upon two decisions which his Lordship thought applicable to the present case, and it is necessary, in the first instance, to refer to those decisions.

The first of them was the case of *In re Agra and Masterman's Bank* (1). In that case a letter of credit had been given by the *Agra and Masterman's Bank* to a firm abroad, upon the faith of which persons abroad were to be induced to negotiate bills of exchange drawn upon the *Agra and Masterman's Bank*. Bills of exchange were so drawn and negotiated, and persons holding those bills of exchange claimed to prove against the *Agra and Masterman's Bank* in consequence of their not being accepted in pursuance of the letter of credit. The Lords Justices held that the negotiating bills of exchange upon the faith of this letter of credit either constituted a direct contract at law between the persons so taking and holding the bills of exchange, and the *Agra and Masterman's Bank* who had given the letter of credit, in which case no question as to set-off between the bank and the holders of the letter of credit could arise, or, in the alternative, that if there was not such a legal contract, there was, at all events, between the *Agra and Masterman's Bank* and the person receiving the letter of credit from them a legal contract which in equity might be assigned, and inasmuch as the letter of credit was to protect and secure bills of exchange payable absolutely according to their tenor, the letter of credit would be unmeaning and inoperative unless the contract could be assigned free from any equities subsisting between the original parties to it, and that therefore no equity of set-off could arise in such a case. That decision cannot have any application to a question arising upon single instruments like the debentures now before the Court.

The other case upon which the Master of the Rolls founded his decision was the case of *In re Blakely Ordnance Company* (2). So far as the form of the debentures is concerned, that case was very

(1) Law Rep. 2 Ch. 391. (2) Law Rep. 3 Ch. 154.

similar to the present, but there were other facts in it which do not occur here. The debentures in that case were given in pursuance of the terms of an antecedent contract entered into between Mr. *Blakely* and Mr. *Dent* and the promoters of the company, and afterwards embodied in the articles of association, for the sale to the company then projected of certain property belonging to *Blakely & Dent* for a large sum of money, part of which was to be paid by the issue and delivery to *Blakely & Dent*, immediately on the establishment of the company, of debentures to the amount of £150,000, which were to be payable to bearer, the capital to be repayable to bearer at the end of three years from the date of the agreement. The question was raised, whether the issuing of a debenture, professing to be payable to bearer, and to be negotiable as money, would, in a fiscal point of view, be competent to a company of this kind, but, without dwelling upon that question, it is perfectly clear that the bargain which *Blakely & Dent* made was that, so far as the company could do it, debentures which were to be payable to bearer, and therefore to be treated as money, were to be given to them. The Lord Justice *Rolt*, finding that such a contract had been entered into, and was embodied in the articles of association, and that the company was formed to give effect to it, came to the conclusion that the company was estopped from setting up, upon a claim by holders of these debentures to prove for the amount specified in them, any equity or right of set-off which it might have against *Blakely & Dent*, to whom the debentures were originally given. That was a case, therefore, depending on the special circumstances of the antecedent contract, to which I have already referred.

In the present case there is no contract for debentures in any particular form. The contract between *Coqui* and the *Natal Company* was a contract by which he agreed to sell them certain properties which he alleged that he possessed in the colony, and the terms of the contract were that the sum of £11,000, balance of the purchase-money, should be paid by delivery to the vendor, or his nominees, of debentures of the company, carrying interest at 6 per cent. per annum, bearing even date with the transfers of the estates in respect of which they should respectively be given; one-half of those debentures being payable at the expiration of two years, and

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the other half at the expiration of three years from the date thereof.

The contract, therefore, is simply this, that part of the purchase-money was to be paid by instruments formerly called bonds, but now called debentures, of the company, payable at a certain date, and to be given to *Coqui*, the vendor. Taking, therefore, the construction of the debenture as that which must be determined upon the face of it, and without any antecedent contract leading up to a debenture in any particular form, we find that the debenture is constructed in this way. It proceeds upon a recital of a debt due from the company to *Coqui*. The object of the debenture, on the face of it, is to secure to *Coqui* this debt. The covenant is made with him. The payment is to be to him, or his executors, administrators, or transferees. Stopping at that point, the word "transferees" would obviously be simply equivalent to "assigns," and "assigns" would mean, according to the ordinary construction of such an instrument, an assign by deed—an assign in a way in which an assignée of a bond, or other chose in action of the same kind, is created. The executors and the administrators would be subject, if the claim for payment were made by them, to any equities which might exist against *Coqui* himself. So, also, assignees or assigns by deed would be subject to the same equities.

There is nothing, therefore, in the debenture up to that point which would negative the usual rule of equity, that the assignee must take subject to all the equities between the original parties to the contract. We then find added these words, after the word "transferees," "or to the holder for the time being of this debenture." As I understand those words, they do nothing more than this: in order to save the trouble and expense of assignments by deed, they provide that the company will recognise any person who holds the debenture to be in as good a position as if he had become the assign of it by deed, and will not insist upon his proving his title by producing a formal assignment; but there is nothing whatever in these words which, as it seems to me, is intended to put the holder for the time being in a better position than an assign by deed. It would be in the highest degree unreasonable to suppose that an assign by the most formal mode of

assignment would take subject to the equities as against *Coqui*, whereas an assign, not by deed, but by merely manual transfer of the document, would take free from those equities. Indeed, Mr. *Baggallay*, in arguing the case, feeling the difficulty of this, said that he was bound to contend that if his view of the position of the holder of a debenture were correct, an assign by deed also should be held free from any equities as between the company and *Coqui*. But there is not a word in this document which goes to indicate that the assign by deed was to be in a better position than the assign by deed of a chose in action has, according to the doctrine of this Court, always stood. As I understand the document, it in fact amounts to nothing more than this:—the *Natal Company* say to Mr. *Coqui*: "We undertake that we will fulfil this contract either to yourself personally, or to your executors, or to your administrators, or to your assigns by deed, or to any person whom you may make the holder of this debenture, even without a deed, but what we undertake to fulfil, whether to you or to any other of these parties, is the contract, and nothing but the contract, which we have made with you, and if in our dealings with you there is anything that might affect that contract, the person who takes the contract by assignment must take subject to the equity between us." There is nothing, therefore, here in any engagement antecedent to the debenture, nothing in the surrounding circumstances of the case, and nothing in the construction of the debenture itself, to shew that the *Natal Company* intended to forego or to renounce the ordinary rule, that the assignee of a chose in action must take subject to the equities between the original parties. The proviso at the end of the debenture, was relied upon: "Provided also that the payment of the said sum of £500, or other amount due upon this debenture bond to the person presenting the same, shall be a good and sufficient discharge to the company from any claim or demand in respect thereof." That proviso, however, is not a proviso for the benefit of either the assignee or the holder of the debenture; it is a proviso for the benefit of the company itself, in order to absolve the company from the burden of having to look into the title of any person who might present the debenture to them for payment. It does not oblige them to pay to any person who presents the debenture, it merely absolves them from subse-

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quent liability if they do, in point of fact, pay to a person who presents the debenture.

In my opinion, therefore, although the *Financial Corporation* must be admitted to prove upon these debentures, they can only prove as persons who are depositees and holders of them under Mr. *Coqui*, and subject to all equities which exist between him and the company. The order of the Master of the Rolls must be varied accordingly.

Solicitors for the Appellant: Messrs. *Stevens, Wilkinson, & Harries.*

Solicitors for the Respondents: Messrs. *Flux, Argles, & Rawlins.*

L. C. 1868 *March* 4, 5; *April* 15.

JONES *v.* BADLEY.

Mortmain—Will—Secret Trust.

A testatrix devised the residue of her real estate, not applicable under her will to the purpose of mortmain, to *A.*, and *B.* his son, as joint tenants. A bill was filed impeaching the devise to *A.* and *B.* on the ground that the testatrix had made the devise to them on a secret trust for charitable purposes:—

Held, that the onus lay upon the Plaintiffs to shew that a trust for charity was communicated to, and expressly or tacitly accepted by the devisees, and that the Plaintiffs had failed upon the evidence to make out this case.

Decree of the Master of the Rolls reversed.

Wallgrave v. *Tebbs* (1) approved.

THIS was a suit by the co-heiresses and next of kin of *Caroline E. Pargeter*, seeking to establish that the Defendants, the residuary devisees and legatees of *Caroline E. Pargeter*, were trustees for the Plaintiffs, on the ground that the gift was made to the devisees on a secret trust for charitable purposes.

The Master of the Rolls held that the secret trust had been established, and that the Defendants must be declared trustees for the Plaintiffs, as reported (2), where the facts are fully stated.

The Defendants appealed, and the case was partly heard before

(1) 2 K. & J. 313. (2) Law Rep. 3 Eq. 635.

Lord *Chelmsford*, who resigned the Great Seal before the arguments were concluded. The case was then heard by Lord *Cairns*.

Sir *Roundell Palmer*, Q.C., and Mr. *F. C. J. Millar*, for the Appellants.

Mr. *Jessel*, Q.C., and Mr. *Sargant*, for the Plaintiffs.

Mr. *Baggallay*, Q.C., and Mr. *Peck*, for the executors.

Sir *Roundell Palmer*, in reply.

[The same cases were cited, and nearly the same arguments were used, as on the hearing in the Court below: *Burney* v. *Macdonald* (1) was also referred to.]

Apr. 15. LORD CAIRNS, L.C.:—

In this case a bill was filed by the Plaintiffs as heiresses-at-law and next of kin of Miss *Caroline E. Pargeter*, of *Foxcote*, near *Dudley*, who died on the 26th of April, 1864, at the age of sixty-five. Miss *Pargeter*, by her will, dated the 8th of August, 1862, after several specific devises and pecuniary bequests, gave all the residue of her real property and of her property savouring of realty to the Defendants, *John Badley* and *James Payton Badley*, as joint tenants. The Plaintiffs insist that this residue was given on a secret trust for charity, and by this bill prayed that the Defendants, the *Badleys*, might be declared to be trustees of it for the Plaintiffs. The Master of the Rolls, by his decree, dated the 14th of January, 1867, has made a declaration to this effect, and directed accounts and inquiries upon that footing, and from that decree this appeal is brought.

Upon the law applicable to such a case there is no controversy. Both Appellants and Respondents were content to take it, as the Master of the Rolls took it, from the clear and felicitous exposition of it by Lord Justice *Wood*, when Vice-Chancellor, in the case of *Wallgrave* v. *Tebbs* (2). Where a person knowing that a testator, in making a disposition in his favour, intends it to be applied for

(1) 15 Sim. 6; 9 Jur. 588. (2) 2 K. & J. 313.

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purposes other than for his own benefit, either expressly promises, or by silence implies, that he will carry the testator's intention into effect, and the property is left to him upon the faith of that promise or undertaking, it is in effect a case of trust, and in such case the Court will not allow the devisee to set up the *Statute of Frauds*, or, rather, the *Statute of Wills*, by which the *Statute of Frauds* is now in this respect superseded, and for this reason:— The devisee, by his conduct, has induced the testator to leave him the property, and, as the Lord Justice *Turner* says in *Russell* v. *Jackson* (1), no one can doubt that if the devisee had stated that he would not carry into effect the intentions of the testator, the disposition in his favour would not have been found in the will. But in this the Court does not violate the spirit of the statutes; but for the same end, namely prevention of fraud, it engrafts the trusts on the devise by admitting evidence which the statute would in terms exclude, in order to prevent a devisee from applying property to a purpose foreign to that for which he undertook to hold it. Another test, which is founded on the same principles, and which has sometimes been applied, is to consider the case as unaffected by the Statutes of Mortmain or Wills, and then to inquire whether a trust has been imposed by the testatrix, and accepted by the devisee in such a way that a Court of equity would enforce it as binding on the conscience of the devisee.

The law applicable to the case being, therefore, free from doubt, we have to examine the facts for the purpose of ascertaining the answers to two questions. First: Did the testatrix, so far as her own mind and intention were concerned, devise her residue to the Messrs. *Badley* in order that they might take, not beneficially, but as trustees for the accomplishment of some charitable purpose? And secondly: if the first question is answered in the affirmative, was her mind and intention in this respect made known before her death to the Messrs. *Badley*, or either of them, and was the devise accepted by them, or either of them, expressly or tacitly on this footing?

As to both of these questions, the onus of establishing the affirmative must be upon the Plaintiffs:—[His Lordship then commented on the evidence at length.]

(1) 10 Hare, 204.

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On the whole, I am of opinion that whatever charitable desire or object may have existed in the mind of the testatrix when she made this devise of the residue, the Plaintiffs have entirely failed to shew that any secret trust for charity was communicated to, much less accepted or acquiesced in by, the Defendants or either of them.

I am of opinion that the decree must be reversed, and the bill dismissed. I assume that in such a case no costs will be asked for.

Solicitors for the Plaintiffs: Messrs. *Clarke, Woodcock, & Ryland,* agents for Mr. *Chesshire, Birmingham.*

Solicitors for the Devisees: Messrs. *Ashurst, Morris & Co.*

Solicitor for the Executors: Mr. *S. W. Johnson.*

HARTLEY *v.* BURTON.

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April 21.

Mortgage—Re-conveyance—Incorrect Recitals—No Recitals.

A man cannot be required to execute a deed containing incorrect recitals. Where all the persons interested in an equity of redemption concur in the deed of reconveyance, the mortgagee cannot insist on having the dealings with the equity of redemption stated in the deed, or object to the deed because it contains no recitals whatever.

BY an indenture of mortgage, dated the 16th of July 1853, *John Hartley, Joseph Hartley, Stephen Hartley,* and *Thomas Hartley,* conveyed a piece of land at *Bradford* to *Joshua Burton* in fee, subject to a proviso for redemption and reconveyance to the said *John Hartley, Joseph Hartley, Stephen Hartley,* and *Thomas Hartley,* as tenants in common, their respective heirs and assigns, or otherwise as they should in that behalf order or direct, on payment by them, their heirs, executors, administrators, or assigns, to *Joshua Burton,* his executors, administrators, or assigns, of the sum of £1000 and interest.

The four mortgagors were partners, and after the date of the mortgage several dealings took place between them affecting their interests in the mortgaged land. In 1864, *John Hartley* died intestate, leaving *Elizabeth Hartley* his administratrix, and *Joseph*

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Hartley the younger his heir-at-law. In August, 1866, the *Hartleys* paid off the principal money and interest then due on the mortgage, and soon afterwards their solicitor forwarded to *Burton's* solicitor the draft of a reconveyance, bearing date the 3rd of September, 1866, and containing several recitals of agreements and dealings between the *Hartleys*, and purporting to convey the land to *Stephen Hartley* and *Thomas Hartley*. *Burton's* solicitor returned the draft with alterations and additions to the recitals, setting out at length the agreements and dealings between the *Hartleys*, which increased the length of the draft materially. Much correspondence took place between the solicitors, and ultimately the solicitor of the *Hartleys* proposed to prepare a deed of reconveyance without any recitals at all, to which *Burton's* solicitor refused to accede. On the 4th of September an engrossment, dated the 3rd of September, 1866, without any recitals, but following in other respects the draft which had been sent to *Burton's* solicitor, was executed by *Joseph Hartley*, *Stephen Hartley*, *Thomas Hartley*, *Elizabeth Hartley*, and *Joseph Hartley* the younger, and tendered to *Burton*, who refused to execute. Some further correspondence ensued, and *Burton's* solicitor offered to refer the matter to any conveyancer of repute in *London*, on condition that all costs were borne by Messrs. *Hartley*, as mortgagors. On the 3rd of October this bill was filed by *Thomas Hartley* and *Stephen Hartley* against *Joshua Burton*, praying that he might be decreed to execute the said indenture of the 3rd of September, 1866, and pay the costs of the suit.

The Defendant, by his answer, said that the only proper course was to notice in the deed of reconveyance certain agreements between the *Hartleys* of which he had received notice, and he denied that the alterations made by his solicitor were unnecessary; and the Defendant's solicitor, in an affidavit, stated that some of the recitals contained in the draft were untrue.

The suit came on to be heard before the Master of the Rolls, who decided in favour of the Plaintiffs (1), and by his decree, as drawn

(1) 1867, May 29. The MASTER OF THE ROLLS said that he was totally unable to understand why the Defendant refused to execute the deed. He was perfectly safe; there was more detail and more accuracy in the detailed recitals, but the mortgagee had nothing to do with that; all he had to do was to see that he was safe. Having accepted his money, he could not reasonably have refused to execute the deed with the recitals as first shewn, and

up, ordered that the Defendants, the devisees and executors of *Burton* (who had died during the progress of the suit), should execute a proper conveyance in accordance with the draft of the indenture in the 10th paragraph of the bill mentioned (this was the draft containing the recitals) with such alterations as had been rendered necessary by the death of *Burton*, and the Defendants were ordered to pay the costs of the suit.

From this decree the Defendants appealed.

Mr. *Druce*, Q.C., and Mr. *Wickens*, in support of the appeal :—

A deed of reconveyance ought to contain a true statement of the devolution of the equity of redemption for the protection of the mortgagee, otherwise some of the *Hartley* family might afterwards claim some other interest, and the mortgagee might be exposed to litigation. At all events, the mortgagee cannot be forced to execute a deed with incorrect recitals.

Mr. *Baggallay*, Q.C., and Mr. *Morshead* for the Plaintiffs :—

We objected to have these agreements stated at length : *Hampshire* v. *Bradley* (1); and were justified in doing so.

[The LORD CHANCELLOR requested to see an office copy of the decree, and then pointed out that the decree ordered the execution of a deed similar to the original draft, not to the engrossment which had been tendered. It was stated at the bar that this was a mistake, and contrary to the indorsements on the briefs, but had hitherto been overlooked.]

Mr. *Druce* in reply :—

At all events we must have the costs of the suit, as we offered to refer the matter to any conveyancing counsel. The whole difficulty has arisen from the dealings by the mortgagors with the equity of redemption, and the mortgagee ought not to be damnified thereby.

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had no right to require the agreements to be set out in full. A decree must be made that the mortgagees execute the deed, as asked by the bill, with the recitals as they appeared in the first instance, and the Defendants must pay the costs of the suit.

(1) 2 Coll. 34.

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LORD CAIRNS, L.C. :—

The issue stated in the bill is very clear and simple. There had been a mortgage by four, and the mortgagee was called upon to convey, and was ready to convey. One of the mortgagors was dead, and his administratrix and heir were to be made parties. In the first instance a deed of reconveyance was prepared and proposed to the mortgagee, containing recitals said to be not accurate as to the devolution of the title. It may be a question whether any recitals at all are necessary, but nothing can justify incorrect recitals; nothing can cast more suspicion upon a transaction than a deed containing recitals which are not true, and the practice of inserting them, if it exists, ought not to be continued. When the case was opened, it seemed that the question was whether the deed should be executed with these recitals; but that was not the issue raised by the bill, though a direction as if it had been raised has crept into the decree. All I can do is to treat this case upon the issue raised by the bill. No harm could come to the mortgagee by executing the instrument tendered to him, executed by the three living brothers and the heir and administratrix of the deceased brother, and what may have taken place between them is immaterial, as they all now concur. Though the mortgagee was right in resisting a deed containing incorrect recitals, he was wrong in refusing to execute a deed with none at all, so long as it was concurred in by every person who had any interest in the property. The Defendants must execute the deed and pay the costs of the suit, but there will be none of the appeal.

Solicitors for the Plaintiffs: Mr. *M. K. Braund*, agent for *J. Green, Bradford, Yorkshire.*

Solicitors for the Defendants: Messrs. *Paterson, Snow, & Burney*, agents for Messrs. *Wells & Ridehalgh, Bradford, Yorkshire.*

ATWOOD *v.* MAUDE.

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Feb. 21, 29; *March* 2, 11.

Partnership—Dissolution—Return of Premium.

The Plaintiff and Defendant entered into partnership as solicitors for a term of seven years, the Plaintiff paying a premium of £800. The Defendant, before entering into the partnership, knew that the Plaintiff was inexperienced and incompetent in his profession, and assigned that reason for requiring the amount of premium which was paid. After the expiration of two years the Defendant complained that the Plaintiff's incompetence was injurious to the business, and called on him to dissolve the partnership; and the Plaintiff thereupon filed a bill praying for a dissolution and for a return of a proportionate part of the premium:—

Held (reversing the decision of *Stuart*, V.C.), that the Plaintiff was entitled to the return of a part of the premium proportionate to the unexpired portion of the term.

THIS was an appeal from a decree of Vice-Chancellor *Stuart*.

On the 7th of January, 1864, the Plaintiff, Mr. *W. F. H. Atwood*, and the Defendant, Mr. *H. A. Maude*, entered into an agreement for partnership as solicitors and attorneys. The agreement contained, among others, the following stipulations:—

That the partnership should last for the term of seven years, the Plaintiff paying to the Defendant the sum of £800 as purchase-money for one-third part of the profits of the business of the Defendant, and also a similar part of the office furniture and effects therein, which calculation was upon the basis of the business or profession of the Defendant being worth £600 per annum at that time. That the Plaintiff should bring in as capital for the working expenses of the partnership the sum of £200, which was to be paid into the joint account of the firm at the *London and Westminster Bank*. That the hours of attendance should be from 10 A.M. to 6 P.M., or otherwise as should be mutually arranged. By the 12th article it was provided that, if the Plaintiff should die in the first year of the partnership, the Defendant should repay to the executors or administrators of the Plaintiff the sum of £200, and if in the second year thereof, the sum of £100 of the said premium, such repayments to be made in four equal half-yearly payments. After two years no repayment of

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premium was to be made. It was also provided that the partnership should be dissoluble on any breach of the agreement involving risk or pecuniary loss, or in any other particular, after notice in writing from the other partner requesting his fellow to discontinue committing such breach.

The Plaintiff paid the premium of £800, and also the additional £200 as his contribution to the capital. The Defendant brought no capital into the partnership. It appeared from the correspondence between the Plaintiff and Defendant previous to the agreement, that the Defendant knew that the Plaintiff, who had passed his examination as a solicitor in 1860, was very inexperienced in his profession; and in a letter of the 8th of December, 1863, in which the Defendant mentioned the heads of the proposed partnership, he inquired of the Plaintiff whether he was fully determined to stick to the profession and give up all ideas of farming, and referred to the Plaintiff's inexperience as the reason for asking the premium of £800.

Disagreements subsequently arose between the Plaintiff and Defendant, and on the 15th of February, 1866, the Defendant wrote a letter to the Plaintiff, in which he told him that the partnership must be dissolved, and that he had already instructed counsel to file a bill with that object. In the same letter he accused the Plaintiff of constant mistakes and negligence in the conduct of the business, of irregular attendance at the office, and of overdrawing his share of the partnership funds. On the 18th of February the Plaintiff anticipated the Defendant by filing the present bill, in which he prayed that the partnership might be dissolved, and that the premium of £800, and the sum of £200 which had been contributed towards the capital, or a proportionate part thereof respectively, might be returned.

The Defendant in his answer reiterated the charges against the Plaintiff which he had made in the letter of the 15th of February, and entered into evidence in support of them. The Plaintiff filed an affidavit denying the charges of negligence and inattention, and of overdrawing the partnership account.

The Vice-Chancellor decreed a dissolution of the partnership; but being of opinion that the dissolution had been caused by the Plaintiff's own fault, refused to order the return of any part of the

money which he had paid, and from this decision the Plaintiff appealed. (11 W.R. 389)

Mr. *Kay*, Q.C., and Mr. *North*, for the Plaintiff:—

In the absence of fraud or gross misconduct the Court will not allow the partner receiving the premium to keep the whole of it himself if the partnership is prematurely dissolved. And this principle is acted upon even though there may have been some fault on the part of the partner paying the premium: *Bury* v. *Allen* (1); *Astle* v. *Wright* (2); *Featherstonhaugh* v. *Turner* (3); *Hirst* v. *Tolson* (4); *Pease* v. *Hewitt* (5); *Hamil* v. *Stokes* (6).

The common law Courts act upon the same principle in directing the return of part of the premium of an apprentice: *Therman* v. *Abell* (7); *Ex parte Prankerd* (8). Here there was no fraud or gross misconduct on the part of the Plaintiff. The charge of negligence is not proved, and is distinctly denied. The Plaintiff's incompetence, so far as the charge is true, was well known to the Defendant before the partnership, and was taken into account in settling the amount of premium. The dissolution is not forced upon the Defendant against his will. If the Plaintiff had not filed this bill the Defendant would have filed one himself.

If there is any failure of consideration it is on the part of the Defendant, for the amount of the annual profits of the partnership was much exaggerated in the agreement.

Mr. *Bacon*, Q.C., and Mr. *Whitehorne*, for the Defendant:—

It is not denied that the dissolution is caused by the fault of the Plaintiff. It is a simple case of breach of contract. The Plaintiff agreed to perform the duties of a partner for the period of seven years, and paid a premium for the advantage of being admitted a partner. If he has failed to perform his contract, why is he not to forfeit his premium? Incapacity either of mind or body will not relieve a person from the consequences of non-performance of his contract: *Airey* v. *Borham* (9); *Bullock* v. *Crockett* (10); *Freeland* v.

(1) 1 Coll. 589.
(2) 23 Beav. 77. 2 Jur. N.S. 849
(3) 25 Ibid. 382.
(4) 2 Mac. & G. 134.
(5) 31 Beav. 22. 8 Jur. N.S. 1166
(6) 4 Price, 161.
(7) 2 Vern. 64; S.C. 29 Beav. 58, n.
(8) 3 B. & A. 257.
(9) 29 Beav. 620.
(10) 3 Giff. 507. 8 Jur. N.S. 502

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Stansfeld (1); *Akhurst* v. *Jackson* (2); *Hamil* v. *Stokes* (3). Not only is the Plaintiff the person whose conduct occasions the dissolution, but he is the person who now comes to the Court to effect it; and the Court will not allow him to take advantage of his own wrong.

We also rely upon the 12th article of the partnership agreement, which provides that no part of the premium shall be returned after two years.

Mr. *Kay*, in reply.

Mar. 11. LORD CAIRNS, L.C., now delivered the judgment of the Court:—

This case is one of a class of which several instances have of late years come before Courts of Equity, and, to a certain extent at least, the principles upon which the Court acts have been well settled. If the partner who has received the premium should afterwards commit a breach of the partnership articles, and himself dissolve the partnership, or render its continuance impossible, the Court will not allow him to take advantage of his own wrongful act, but decrees the restitution of a proportion of the premium paid, having regard to the terms of the contract and to the length of time during which the partnership has continued. But, on the other hand, if the partner who has paid the premium is guilty of a like breach of the partnership articles, and is himself the author of the dissolution, the Court will not allow him to found a claim to the restitution of the premium upon his own wrongful act.

In the case of *Akhurst* v. *Jackson* the partnership was dissolved by the bankruptcy of the party to whom the premium was payable, but it appeared that the other partner had at the time of the contract notice of the embarrassed circumstances of the partner who afterwards became bankrupt, and as the contract contained no stipulation as to the apportionment of the premium, it was held that the whole was payable. In the subsequent case of *Freeland* v.

(1) 2 Sm. & Giff. 479. (2) 1 Sw. 85.
(3) 4 Price, 161.

Stansfeld (1), where there was no similar notice of the embarrassed circumstances of one of the partners, Vice-Chancellor *Stuart* held that a portion of the premium ought to be returned. In *Bury* v. *Allen* (2) the dissolution of the partnership was occasioned principally by the misconduct of the Defendant, the partner who had received the premium, and Vice-Chancellor *Knight Bruce*, though he considered the other partner, who was the Plaintiff, not wholly free from blame, ordered a portion of the premium to be returned or credited in account. The present Master of the Rolls has acted on the same principles in *Astle* v. *Wright* (3), and subsequent cases; and although in *Lee* v. *Page* (4), where the partnership had been dissolved by mutual consent before bill filed, and the agreement for a dissolution contained no stipulation as to the return of any part of the premium, the Vice-Chancellor *Kindersley* decided that the Plaintiff had no right to a return of any part of the premium, His Honour expressly stated that in so deciding he did not depart from the principle laid down in *Astle* v. *Wright*, where there was no agreement to dissolve, but a bill was filed insisting on the adverse right.

In the case now before us there has been neither bankruptcy nor any agreement to dissolve, and the authority of the cases to which we have referred is not disputed; but it is contended on the part of the Defendant that the partnership must be considered as having been dissolved in consequence of the acts or misconduct of the Plaintiff, and further, that the Plaintiff must be treated as the author of the dissolution, inasmuch as a bill praying for a dissolution has been filed by him. It is evident, however, that in every partnership, and especially in one requiring so much of mutual confidence as a partnership between two solicitors, such a state of feeling may arise and exist between the partners as to render it impossible that the partnership can continue with advantage to either. That state of things may be occasioned by the fault of either or both of the partners; but when it is admitted that this state of feeling does in fact exist, it becomes immaterial by whom the bill is first filed. Here it is the common case of both parties that such a state of things did in fact exist before the bill was filed, and the question

(1) 2 Sm. & Giff. 479.
(2) 1 Coll. 589.
(3) 23 Beav. 77.
(4) 7 Jur. (N. S.) 768; 30 L. J. (Ch.) 857.

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which we have to decide is, whether it was occasioned by such wrongful acts on the part of the Plaintiff as to render it inequitable in him to demand a return of any portion of the premium paid.

The charge with respect to overdrawing from the partnership funds was scarcely, if at all, pressed in the argument, and it is unsupported by any sufficient evidence, and the case of the Defendant mainly rests upon the ground stated in the judgment of the Vice-Chancellor, namely, the negligence and incompetence of the Plaintiff.

The charge of negligence, as distinguished from incompetence, resolves itself mainly into a charge of want of punctuality in attendance at the office during the hours stipulated for in the partnership agreement, but the evidence in support of this charge is very vague and weak, and is, in our judgment, sufficiently answered by the testimony of the Plaintiff; and even assuming it to have been proved that the Plaintiff did not attend at the office on all occasions to the full extent of the time during which he ought to have attended, we do not think that this can be considered to be the cause which has brought about a dissolution, so as to destroy the title of the Plaintiff, if otherwise well founded, to a return of premium.

The case is thus narrowed to the question of incompetence, and it is material to observe that the Defendant, before he entered into the contract, had ample means of forming a just opinion of the character and capacity of the Plaintiff. In proof of this, it is only necessary to refer to the letter of the 8th of December, 1863.

The Defendant must be taken, therefore, to have knowingly entered into partnership with a person of little or no experience, or aptitude for business, and who would require for some considerable time to be aided and instructed in the transaction of the business of the office. The Defendant, in fact, asked for and obtained from the Plaintiff on that very ground of the Plaintiff's incompetence a higher price for a share in the business for seven years than he could otherwise have demanded, and it would be in the highest degree inequitable that he should now be allowed to set up the same incompetence as a ground for dissolving the partnership, and at the same time retaining the premium thus obtained. It might

have been otherwise, if any act of fraudulent or wilful misconduct had been alleged and proved against the Plaintiff, but there is no such charge. We think the case is one in which, using the words of Lord *Cottenham* in *Hirst* v. *Tolson* (1), a payment has been made by anticipation of something afterwards to be enjoyed, where, if circumstances arise so that that future enjoyment is denied, the party paying is not to lose his money.

The Defendant appears to have considered—and, indeed, it was argued, though faintly—that after two years no repayment of any premium should be made under any circumstances; but we think that the 12th clause of the agreement, upon which reliance was placed, relates exclusively to the event of the death of either of the partners, and does not in any manner affect the question now before us.

The Defendant has, by his evidence, presented another view of this case. His witness, Mr. *Woodward*, in his affidavit, speaking of the Plaintiff, says:—"I consider him utterly incompetent to manage the most trivial legal matters; indeed, that such is the case would be apparent to anybody who conversed with or had any business communications with him. I often told him he was not fitted for the law, and was much astonished when I had heard he had entered the profession."

Now, adopting this evidence, and considering the ample means of knowledge which the Defendant possessed respecting the aptitude or unfitness of the Plaintiff for the business of a solicitor, it must be taken that the Defendant was well aware that he was taking into partnership a person so incompetent as to be certain to be rather an inconvenience than a help, and that he thought it worth while to accept a sum of £800 as the price of submitting to a certain inconvenience for a period of seven years. The inconvenience has turned out to be greater than it was anticipated to be; in fact, so great as, in the language of the Defendant, "to render it painfully evident that the partnership could not continue."

In this view of the case, can it be just that the Defendant, who has received the £800 as the price of submitting to the inconvenience for the whole term of seven years, but who will now be relieved from it, should nevertheless retain the whole sum? We

(1) 2 Mac. & G. 134.

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think not; and we think that upon the whole case, and consistently with the principles acted upon in the cases to which we have referred, the Plaintiff is entitled to the return of such a part of the sum of £800 as bears the same proportion to that sum which the unexpired period of the term of seven years bears to the whole term.

Solicitors for the Plaintiff: Messrs. *Norris & Allen.*
Solicitor for the Defendant: Mr. *H. A. Maude.*

LORD CARINGTON *v.* WYCOMBE RAILWAY COMPANY.

L. JJ.
1868
Feb. 12.

Lands Clauses Act, s. 128—*Superfluous Lands—Right of Pre-emption—"Land in a Town"—Fraud on Parliamentary Powers.*

A railway company gave to landowners notice to treat in respect of a close of land containing 1A. 27P., part of the *C.* estate. The price was settled between the parties, and the land conveyed to the company by a deed not in the statutory form, including the mines and all the estate of the vendors. The company used about three perches of the land for their railway; and about two years after their purchase they, in pursuance of a contract which, before the notice to treat, they had made with *T.*, to convey to him all such part of the *C.* estate as lay between his land and the railway, conveyed the remaining 1A. 24P. to him by a deed which recited that it was superfluous land. The land was situate within the limits of a borough, but was at some distance from the mass of houses forming the town. There were two cottages upon it:—

Held (affirming the decree of *Stuart*, V.C.), that the land was not "land in a town," nor "land built upon or used for building purposes," within the meaning of the *Lands Clauses Act*, sect. 128, so as to take away the vendors' right of pre-emption; that this right was not extinguished by the mode of conveyance; and that, although the ten years mentioned in the 127th clause of the Act had not expired, the vendors, inasmuch as the company had parted with the land as superfluous, could at once exercise the right of pre-emption:

Held, also, that the vendors would have been entitled to relief on the ground that the company had taken the land, not for the purposes of their Act, but in order to enable them to fulfil their contract with *T.*

THIS was an appeal by the Defendants from a decree of Vice-Chancellor *Stuart* (1).

In 1857 the *Wycombe Railway Company* obtained an Act for making an extension railway.

By deed dated the 23rd of October, 1858, the company, in consideration of a sum of £20,000 stock to be transferred to them by *W. Terry*, agreed that from such transfer the lands to be purchased for the extension railway should be charged with a fee farm rent of £800, payable to *Terry*, his heirs and assigns; and that the company, so soon as they should be in possession of and legally entitled to deal with the whole of the land being part of *Castle Hill*, lying between *Terry's* rectory farm and the site of the extension railway, would convey it to *Terry* in fee without charge.

(1) Law Rep. 2 Eq. 825.

L. JJ.
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LORD CARINGTON v. WYCOMBE RAILWAY CO.

The *Castle Hill* estate belonged to persons named *Smith*, who were, in fact, trustees for the Plaintiffs, though this did not appear in the bill. In 1859 the company served on them notice to treat in respect of three pieces of land, one of which, containing 1A. 27P., was the land to which the suit related. The price was ascertained by valuers chosen by the parties, and the purchase of the piece of land in question was completed by an indenture, dated the 26th of February, 1862, by which, in consideration of £700 paid to the *Smiths* by the company in full for the purchase of the land, and in full compensation for all damage by severance, and for all injury done to other or adjoining lands of the *Smiths* by the railway, and in lieu of all accommodation works, the *Smiths* conveyed the piece of land to the company, "with all mines and minerals in and under, and all houses, outhouses, buildings, woods, &c., upon," and all ways, &c., belonging or reputed to belong to the land in question, "and all the estate, right, title, interest, use, trust, inheritance, property, benefit, claim, and demand whatsoever at law and in equity" of the *Smiths* and every of them into, out of, and upon the land, to hold the premises unto and to the use of the company, their successors and assigns, for ever. "And it is hereby agreed that these presents are intended to operate and take effect as a conveyance of the hereditaments and premises hereby assured, made as near to the form in Schedule A. to the *Lands Clauses Consolidation Act*, 1845, as the circumstances of the case will admit, and also in every other mode in which the same may operate and take effect independently of such last-mentioned Act." The deed contained covenants for title in the usual form, and was framed without any regard to the form in Schedule A. to the *Lands Clauses Act*.

The company required only three perches of this land for the purposes of their railway; and by an indenture, dated the 4th of July, 1864, reciting the deed of the 23rd of October, 1858, and reciting that the land to be conveyed was superfluous land, and that, as it was in a town, no right of pre-emption belonged to any one, the company, expressly in pursuance of the covenant in that deed, conveyed the remaining 1A. 24P. to the Defendant *Terry* in fee.

The land in question had formed part of the pleasure-grounds of

Castle Hill, which was a mansion with about six acres of ground attached to it. The greater part of the piece in question was within the boundary of the borough of *Wycombe,* but was indisputably outside of the buildings forming the town. There was upon the land a house called *Flint Cottage,* and a cottage at the back of it, but both were at a considerable distance from any of the houses in the town.

In the same month of July, 1864, the Plaintiffs took a conveyance from the *Smiths* of the *Castle Hill* estate, except such part of it as had been sold to the company.

In December, 1864, the Plaintiffs filed their bill against the company and *Terry,* to have the 1 A. 24 P. conveyed to the Plaintiffs as entitled thereto by virtue of the right of pre-emption given them by the *Lands Clauses Act.* The bill was subsequently amended by stating the conveyance to *Terry* to have been made in pursuance of the contract of 1858, and by alleging that the land so conveyed was never *bonâ fide* required by the company for the purposes of their undertaking, but was bought by the company under colour of their parliamentary powers for the purpose of being re-sold to *Terry,* and that neither the company nor any person claiming under them could retain the land as against the Plaintiffs.

Vice-Chancellor *Stuart* held that the Plaintiffs were entitled to recover the land by virtue of their right of pre-emption, and made a decree setting aside the conveyance to *Terry,* and ordering the Defendants, on payment of the purchase-money, to be ascertained according to the *Lands Clauses Act,* sect. 130, to convey to the Plaintiffs, and ordering the Defendants to pay the costs of the suit.

Mr. *Bacon,* Q.C., Mr. *Greene,* Q.C., Mr. *Speed,* and Mr. *Streeten,* for the Appellants:—

This was land in a town: *Elliott* v. *South Devon Railway Company* (1); *Reg.* v. *Cottle* (2); *Co. Litt.* (3); *Blackstone's* Commentaries (4). There therefore could not be any right of pre-emption under the *Lands Clauses Act,* sect. 128. But apart from that, the

(1) 2 Ex. 725.
(2) 16 Q. B. 412.
(3) § 164.
(4) Vol. i. p. 114.

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purchase was not a compulsory one, but a purchase by agreement, and the vendor in such a case, if he desires a right of pre-emption, ought to reserve it. The words of the conveyance extinguish every right of the vendors in the land, including any right of pre-emption there might be. The Plaintiffs cannot be heard to say that the company did not want this land, for the company are the judges whether they want land or not: *Stockton and Darlington Railway Company* v. *Brown* (1). The time has not arrived when the right of pre-emption, if any, can be claimed.

Sir *Roundell Palmer*, Q.C., and Mr. *Kekewich*, for the Plaintiffs:—

[The LORD JUSTICE LORD CAIRNS:—It is unnecessary to hear you on the question whether this land was taken under the powers of the Act.]

Then we must succeed on both grounds. There was a right of pre-emption, for this clearly is not land within a town: *Elliott* v. *South Devon Railway Company* (2); *Reg.* v. *Cottle* (3); and the suit is not premature, as the company have declared the land to be surplus land, and have parted with it. No doubt the company are the judges of what land they require for the purposes of their works, but they must judge *bonâ fide*. Here they did not buy for the purposes of their works, but in order to carry into effect a previous contract with *Terry*. This was a fraud on their powers.

Mr. *Greene*, in reply.

LORD CAIRNS, L.J.:—

In this case the bill alleges, and, in my opinion, sufficiently alleges, two distinct cases, either of which, if supported by the facts, would entitle the Plaintiffs to relief.

In the first place, it alleges that the piece of land in question, containing something over an acre, taken by the Appellants, the railway company, under their compulsory powers, and ostensibly for the purposes of their Act, was not really taken for those purposes, but in order to fulfil a contract which they had pre-

(1) 9 H. L. C. 246. (2) 2 Ex. 725.
(3) 16 Q. B. 412.

viously made with the Appellant, Mr. *Terry*, that they would, for a valuable consideration, make over the whole of this piece of land to him. The alternative case alleged by the bill is, that whether the land was acquired for the purposes of the Act or not, it has since become superfluous land within the meaning of the *Lands Clauses Consolidation Act*, and that those who are the owners of the land from which it was severed are entitled to the offer of it, and to purchase it if they are so minded, before it is offered or sold to any other person. Either of those cases, if established, would, as I have said, entitle the Plaintiffs to relief, though the measure of relief might be in some degree different. According to the first of these alternative cases, the Plaintiffs would probably be entitled to a return of the land, giving back such part of the price received by them as would be attributable to this quantity of land. In the second case they would be entitled now to exercise their option to purchase, and if the price on re-sale was not agreed upon, then the parties would be entitled to have the price settled by arbitration according to the clauses of the Act.

It was upon the second of these grounds that the decree of the Vice-Chancellor has proceeded; and as the Plaintiffs on their part are satisfied with a decree on that footing, and we agree with the view of the Vice-Chancellor on that point, it is not necessary to go at length into the first ground to which I have referred; but as some part of the argument was addressed to it, I think it right to state my opinion upon it. There is no controversy as to the facts; and it appears to me that a more distinct and more openly avowed case of the use of parliamentary powers for purposes not intended by Parliament never has been presented to the Court, and that this is exactly one of those cases which was described by Lord *Cranworth*, in *Galloway* v. *Mayor and Commonalty of London* (1), where his Lordship said: "The principle is this, that when persons embarking in great undertakings, for the accomplishment of which those engaged in them have received authority from the Legislature to take compulsorily the lands of others, making to the latter proper compensation, the persons so authorized cannot be allowed to exercise the powers conferred on them for any collateral object." The land here, in my opinion, was taken, and

(1) Law Rep. 1 H. L. 34, 43.

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is avowed to have been taken, for that which was an object entirely collateral, namely, to give to Mr. *Terry* that which he had bargained for as part of the consideration for the sale of the £20,000 stock.

It was said, however, that in order to obtain relief on this ground the Plaintiffs must shew that, if the land had not been conveyed to Mr. *Terry*, or the company, they would be the owners of it, and it is said that the Plaintiffs took by conveyance from the Messrs. *Smith*, not this land in question, but all the other land adjacent to it, expressly excepting that which had been conveyed to the railway company. This, if an objection, would be purely one of form, because it is perfectly clear from the evidence in the cause that the Messrs. *Smith*, who themselves give evidence to that effect, held the whole of the land as trustees for the Plaintiffs, and left the management of it to the Plaintiffs, as the persons beneficially entitled, and at the most it would be necessary that the Court should adopt some course for putting upon the record the title of the Plaintiffs as beneficiaries of this small piece of land, for which purpose I think the Court would readily permit an amendment. It is not, however, necessary to pursue that subject further, as the Plaintiffs are satisfied with relief founded on the ground of their alternative case.

The alternative case deals with this land as superfluous land. The definition of superfluous land in the *Lands Clauses Act* is, "lands acquired by the promoters of the undertaking under the provisions of this or the special Act, or any Act incorporated therewith, but which shall not be required for the purposes thereof." The land in question, for whatever purpose it was acquired, is clearly now superfluous land within this description. It was land which was acquired *de facto* under these parliamentary powers, and it is not required for the purposes of the Act, and accordingly, in the conveyance to Mr. *Terry*, the railway company have themselves stated that it is superfluous land, and cannot now dispute the fact. The Plaintiffs, therefore, being now the persons entitled to the land from which this piece of land was originally severed, have the right of pre-emption before it is sold to any one else, unless it can be shewn that it is land situate within a town, or land built upon or used for building purposes.

The first question, therefore, is, is it land situate within a town? Now, looking at the maps which are in evidence, it is, in the first place, clear that this land is not any part of the *solum* covered by what I may term the *congeries* of houses which form the high street of the town, and the rear or back part of that high street. It therefore is not land which comes within the definition of land situate within a town given in the cases which have been decided in the Court of Exchequer and the Court of Queen's Bench—land surrounded by continuous houses, or land covered by continuous houses—using the term "continuous" in the popular sense, as distinguished from contiguous. But, moreover, reverting to the position of things before the railway cutting was made, this land (with the exception of *Flint Cottage*, of which I will say a word presently) formed part of what I may term the demesne or pleasure ground of *Castle Hill*, which was held along with the mansion house of *Castle Hill*, and if the land in question was within the town, it seems to me to follow, as a necessary consequence, that *Castle Hill* itself was within the town, which no person has attempted to contend.

It is said that the borough boundary includes the whole or the greater part of this land. That, although a circumstance not to be overlooked, appears to me to be in no way conclusive of the matter, because we all know there are many boroughs whose parliamentary and municipal boundary goes out into green fields very far beyond what may be termed, in the popular sense, "the town." In addition to that, I find that between the piece of land in question, and what I have termed the *congeries* of houses forming the front and rear of the houses in *High Street*, there is another piece of land which, upon all the maps, is called meadow land, and which seems to have had upon it a barn, a cowshed, and homestead, all the indications of rural as distinguished from urban life. As to the *Flint Cottage*, it appears to have been one of those rural tenements which are to be found in all parts of the country, and not in any way a building connected with or to be referred to the town of *Wycombe*. I think, therefore, that the land in question is clearly not situate within a town.

Is it, then, land "built upon"? These words, no doubt, are not very precise, but I think we have quite sufficient means of

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judging of the intention of the Legislature in using them. It appears to me that the words "built upon" must mean to describe something which, though it cannot be called land in a town or part of a town, is land covered with continuous buildings *eodem modo* as the *solum* of the town. The Legislature cannot have meant that, because a piece of land in the open country has a building upon it, it is "land built upon" within the meaning of this section. In the sense in which the Legislature must be taken to have used those words, I think that this land clearly does not come within them. Then, is it land "used for building purposes"? That may be determined by the evidence of the Defendants themselves. I observe that all their surveyors, when they speak of the land, abstain from asserting that it is land built upon, but they vary their expression in a way which entirely removes it from the operation of this section. They say that it is land suitable for building purposes, and was valued at a high price because it might become at some time building land. But what the Act of Parliament requires, in order to bring the case within the exception, would be not that it should be capable of being used as building ground, but that it actually and *de facto* should be land used for building purposes, which this land clearly is not. Therefore it seems to me that none of the exceptions in the 128th clause apply to this land, and that the right of pre-emption of the Plaintiffs to it is clearly established.

Then it was said that the Plaintiffs were premature in asserting this right, because the period of ten years from the time limited by the special Act for the completion of the works had not expired. That would have been a perfectly good answer if the company had still retained possession of the land, and the Plaintiffs had claimed that they should sell it at this particular time as surplus land. The company could not have been compelled so to do, but they have themselves anticipated the period of ten years by selling the land as superfluous land to Mr. *Terry*.

It appears to me therefore that upon this second branch of the case the title of the Plaintiffs is clearly made out, and that this appeal ought to be dismissed with costs. I observe, however, that the decree does not reserve liberty to apply. Now, it seems to me that, as the 130th section of the Act only says that if the

owner and promoters of the undertaking do not agree as to the price of the land, such price shall be ascertained by arbitration, it may be a question of how that arbitration is to be conducted, for the Act of Parliament does not say that it is to be an arbitration of the kind mentioned in the earlier sections; and if any difficulty arises as to that, I think application should be made to the Court; liberty to apply for that purpose should therefore be reserved.

SIR C. J. SELWYN, L.J.:—

I also think that the Vice-Chancellor has arrived at a correct conclusion in this case, and that there is no foundation for this appeal.

I concur in the observation with which the Vice-Chancellor commences his judgment, namely, "Considering the enormous powers conferred by the Legislature on railway companies in enabling them to compel parties to part with their land, it is the duty of the Courts to see that those powers are scrupulously exercised, and that companies do not go beyond the powers granted to them."

In the present case the company, before serving the notice to treat, had entered into a contract by which they bound themselves to convey to *Terry* all their interest in the land in question when purchased by them; and after reading that deed it is manifest that this particular piece of land was not acquired by them for any of the purposes of their Act, but for a collateral purpose, namely, that of subsequently transferring it to *Terry*. This was a clear abuse of their statutory powers.

As regards the Plaintiffs' right of pre-emption of the lands in question under the 128th section of the *Lands Clauses Act*, the Appellants contend, first, that the case falls within the exception contained in that section; and, secondly, that even if such a right ever existed, it has been released or extinguished by the conveyance of the 26th of February, 1862.

With respect to the first point, the Appellants contend that the land in question, or the greater part of it, is within the limits of the borough of *Wycombe;* but, as the Vice-Chancellor has observed, the word "borough" occurs in other parts of the statute,

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and is to be found more than once in the interpretation clause, but it is not to be found in the 128th section. The explanation of the word "town" given by Baron *Parke* in *Elliott* v. *South Devon Railway Company* (1) appears to have been adopted in all the subsequent cases which were cited. And the Master of the Rolls, in the very recent case of *Wallace* v. *Attorney-General* (2), when called upon to determine the topographical extent of *London*, quotes from Sir *William Petty*, who wrote in the reign of *James II.*, a passage in which he defines *London* to be "the housing within the walls of the old city, with the liberties thereof, *Westminster*, and the borough of *Southwark*, and so much of the built ground in *Middlesex* and *Surrey* whose houses are contiguous unto and within call of those afore mentioned."

If the property in question had been the *Flint Cottage* only, there might have been more room for doubt. But although that cottage was at the east, and another cottage at the west, of the property in question, that property mainly and in substance consisted of a piece of meadow land formerly part of the land attached to the mansion of *Castle Hill*, and no distinction can be drawn between this piece of meadow land and the rest of the *Castle Hill* property to which it was attached, and it cannot be reasonably contended that *Castle Hill* mansion is situate within the town. There is equally little ground for the contention that the land in question is land built upon or used for building purposes; for if the mere circumstance of two cottages existing upon it would bring it within this exception, any large park—such, for example, as *Windsor Park*, in which lodges and buildings exist—might be considered as coming within the same description. And, as the Lord Justice has observed, the Defendants' witnesses, although they speak of the land as having been valued as building land, and as being adapted for building purposes, nowhere state that it is or has been used for building purposes.

The second contention of the Appellants—namely, that the right has been released or extinguished—is, I think, at once disposed of by a consideration of the nature of the right itself. For this right of pre-emption is one which continues after, and notwithstanding a sale and conveyance, and may indeed be said to

(1) 2 Ex. 729. (2) 33 Beav. 384, 392.

arise upon and in consequence of such sale and conveyance. And it therefore requires something beyond the ordinary words of an absolute conveyance to indicate an intention to release such a right; and in the present case, although the deed of the 26th of February, 1862, was declared to be intended to take effect as a conveyance made as near to the form in Schedule A. in the *Lands Clauses Consolidation Act* as the circumstances of the case would admit, and also in every other mode in which the same might operate independently of that Act, there is nothing to shew any intention to release the right of pre-emption, and no such intention can be inferred from the union of two forms or modes of conveyance, in neither of which, when separately considered, can a trace of any such intention be found.

It was also contended, on the part of the Appellants, that the 128th section did not apply, because this was a case of voluntary agreement, and not of compulsory purchase. But the transaction commenced with the usual notice to treat given in the ordinary exercise of the company's compulsory powers; and I think the Legislature cannot be considered as having intended to deprive a landowner of the right of pre-emption, because, after having received such a notice, and proceeding to a certain extent towards an arbitration, he comes to an agreement with the company on the subject of the price to be paid without going on to a final award or to an inquiry before a jury.

On the whole, I think that the Appellants' case wholly fails, and that they should pay the costs of the appeal. I agree with the Lord Justice that it may be convenient to insert in the decree a clause giving liberty to apply.

Solicitors for the Plaintiffs: Messrs. *Freshfields.*
Solicitors for the Appellants: Messrs. *Baxter, Rose, Norton, & Co.*

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PAINE *v.* HUTCHINSON.

Contract for Purchase of Shares—Custom of the Stock Exchange—Specific Performance.

The Plaintiffs, who were dealers in shares, contracted to sell to the agents of the Defendant shares which they had purchased from, and which remained registered in the name of, *C.* On the settling-day the agents of the Defendant gave his name to the Plaintiffs as transferee, and *C.* executed transfers to him. The Defendant made no objection to the form of the transfers till more than a month afterwards, when he urged that he had never intended to have the shares registered in his own name, as he had bought them on account of other parties, and without any guarantee being given that he should be registered. A bill for specific performance was thereupon filed, and some months afterwards an order was made for winding up the company:—

Held (affirming the decree of *Stuart*, V.C.), that the Plaintiffs were entitled to a decree for specific performance and indemnity.

THIS case came before the Court on two appeals from a decree of Vice-Chancellor *Stuart* (1).

The Plaintiffs were stockjobbers, and in November, 1865, bought 100 shares in the *Contract Corporation, Limited*, from one *Cruse*. Shortly after this they sold them in the market to *Price & Potts*, brokers, who, on the settling-day, gave the name of the Defendant as transferee. The Plaintiffs thereupon delivered to *Price & Potts* transfers of the shares from *Cruse* to the Defendant, duly executed by *Cruse*. These were handed by *Price & Potts* to *Railton & Sons*, from whom they had received their instructions, and *Railton & Sons*, on the 17th of November, passed them on to the Defendant, who paid the purchase-money, but did not get them registered, and refused to do so, alleging that he bought the shares on another person's account, and never intended to have them registered in his name, nor authorized the giving his name as transferee, and that, as the shares had been sold without any special guarantee that the transfer should be executed by the purchaser, the Defendant was not bound to be registered. In January, 1866, the Plaintiffs filed their bill, praying specific performance, that the Defendant

(1) Law Rep. 3 Eq. 257.

might be ordered to execute the transfers, and procure himself to be registered, and indemnify the Plaintiffs against all losses which might accrue from his neglect to have himself registered. On the 23rd of April, 1866, an order was made for winding up the company. On the 5th of December, 1866, Vice-Chancellor *Stuart* made a decree for specific performance, ordering that the Plaintiffs, and all other proper parties, should execute a proper transfer of the shares to the Defendant, and that the Defendant should procure the shares to be registered in his name, and pay the costs of the suit. The facts will be found at greater length in the report of the case before His Honour.

The articles of association of the *Contract Corporation* gave the directors power to refuse to register a transferee if they considered him to be "an irresponsible person." It was not alleged that the Defendant answered this description.

The Defendant appealed from the whole of the decree. The Plaintiffs also appealed, on the ground that the decree contained no provisions for their indemnity.

Mr. *Greene*, Q.C., and Mr. *Swanston*, Q.C., for the Defendant, in support of his appeal:—

There is a sufficient remedy for the Plaintiff at law, but none in equity: *Grissell* v. *Bristowe* (1); *Walker* v. *Bartlett* (2); *Oriental Inland Steam Company* v. *Briggs* (3). The register cannot be altered in the way asked after an order for winding up, and on a transfer not executed by the transferee: *Emmerson's Case* (4); *Musgrave and Hart's Case* (5). The directors had a veto on a transfer, and as they have never accepted the transferee, specific performance cannot be compelled: *Bermingham* v. *Sheridan* (6). Whether the Defendant is a responsible person is a question the Court will not try. The directors were the sole judges.

Mr. *Bacon*, Q.C., and Mr. *J. N. Higgins*, were then called upon to open the Plaintiffs' appeal:—

The decree is defective in not ordering the Defendant to in-

(1) Law Rep. 3 C. P. 112.
(2) 18 C. B. 845.
(3) 2 J. & H. 625.
(4) Law Rep. 1 Ch. 433.
(5) Ibid. 5 Eq. 193.
(6) 33 Beav. 660.

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demnify the Plaintiffs: *Evans* v. *Wood* (1). In *Shepherd* v. *Gillespie* (2) Vice-Chancellor *Stuart* directed indemnity.

Mr. *Greene*, Q.C., and Mr. *Swanston*, Q.C., *contrà* :—

The Plaintiffs are not on the register, and therefore not liable to pay calls. They are under no liability, and an indemnity is unnecessary. The Plaintiffs will make a profit cut of a decree for indemnity, by getting money paid to them which they are not liable to pay over.

SIR W. PAGE WOOD, L.J.:—

It is very important that, in a matter of this nature, the decree should be brought into the form which the Vice-Chancellor would, no doubt, have considered to be the proper one, if all the previous authorities had been brought before him. In the slight alteration we propose to make, we are in no way altering his decree in substance, but only in words, by inserting a provision which he himself has inserted in a subsequent case.

6 Eq. 646 — 648

As regards the substance of the case, the Plaintiffs bought, on a given day, certain shares of one *Cruse*, and on the same day sold them to the *Prices*, who were the agents of *Railton*, who was the agent of the Defendant. There is a double agency, but the agency is clearly and distinctly proved from the Defendant, through *Railton*, to the *Prices*. At that time the company was in good credit. *Cruse*, shortly after the sale, executed two deeds of transfer to *Hutchinson*. Those deeds of transfer were sent to *Hutchinson*. They are not now forthcoming, having been lost, we do not know how, nor does Mr. *Hutchinson* give a very satisfactory explanation of how they came to be lost. Then the bill is filed in January, and it is not till April that the company is ordered to be wound up. When the bill was filed there was as clear a case for specific performance as can well be conceived. The shares stood in *Cruse's* name, but, from the moment they were bought by the Plaintiffs, they became the property in equity of the Plaintiffs, and *Cruse* was a mere trustee for them. There was nothing to prevent their selling that which was held in trust for them, just as much as if it had been vested in themselves by a legal transfer. Then, having

(1) Law Rep. 5 Eq. 9. (2) Law Rep. 5 Eq. 293.

sold the shares to *Hutchinson*, they take every step necessary on their part. As regards what is sworn by *Hutchinson*, that he did not authorize these shares to be transferred into his own name, the case stands thus upon *Railton's* evidence:—[His Lordship then entered at length into the evidence, and stated the result as follows:—] It is plain, then, that the Defendant authorized Messrs. *Railton* to buy, and that the shares are his. He has had some other transaction or dealing with somebody else about them with which Messrs. *Railton* have nothing to do, and the Plaintiffs have nothing to do. The actual transfers were sent to him as early as the 17th or 18th of November, and, during a correspondence which followed, we find him raising no question at all as to their form until the 21st of December, more than a month afterwards, when he says, for the first time, that the purchase was on other parties' account, and that it will be convenient for saving a stamp, and for some other arrangements, that the shares should not be registered in his own name. That being so, and the contract being perfectly complete when the bill was filed, the Plaintiffs were entitled to their decree for an acceptance by the Defendant of the shares, they, the Plaintiffs, on their part, being bound to procure a transfer of them to the Defendant, and such a decree would have been of course if the company had not become insolvent.

Then, does it make any difference that the company has since been ordered to be wound up? *Emmerson's Case* (1) has not the slightest bearing upon this question. In that case the shares had been bought, each party being ignorant at the time that a Petition for winding up had been presented, and the Lords Justices held that the Court would not enforce a bargain to buy property which, unknown to the parties, had been destroyed before the time of the contract. That is quite inapplicable to the present case. Then, again, *Musgrave and Hart's Case* (2), before Vice-Chancellor *Malins*, was a case of an application, under the 35th section of the *Companies Act*, to rectify the register, and all that Vice-Chancellor *Malins* decided was, that he could not, upon the summary application under the Act, correct the register, but must leave the applicant to file his bill. The Plaintiffs here have taken the course of filing their bill, and it does not seem to us that, in substance, there is

(1) Law Rep. 1 Ch. 433. 12 Jur. N.S. 433 (2) Law Rep. 5 Eq. 193.

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anything erroneous in the decree; but, as we are proposing to alter it by inserting directions for indemnity, we may make some other slight alterations of form.

As regards indemnity, it has been urged that none is wanted, because the shares stand in *Cruse's* name, and not that of the Plaintiffs. But we cannot help seeing that the Plaintiffs are obliged to indemnify their trustee. If the trustee has paid moneys for them in respect of these shares, he is clearly entitled to require indemnity from them. Therefore there is a *primâ facie* probability that damage will arise, and all that has been decided in *Evans* v. *Wood* (1) is, that the Plaintiffs must be indemnified if it does arise. They cannot make a profit of it, as has been suggested. The decree will stand thus:—Decree the agreement to be specifically performed, and order that the Plaintiffs, the *Paines*, and all proper parties (that will include the Defendant), do execute a proper deed of transfer of the 100 shares to the Defendant, such deed of transfer to be settled by the Judge in case the parties differ about the same. Thus far the decree remains unaltered. Then, instead of saying "that the Defendant do procure the said 100 shares to be duly registered," &c., we have thought that it might be convenient to say, "that the Defendant do concur in all steps that may be necessary and proper for causing the said shares to be duly registered in his name in the register of members of the said *Contract Corporation, Limited.*" If these steps all fail (which is not likely), an application may be made in Chambers under the liberty to apply. Then the provisions as to indemnity in *Evans* v. *Wood* will be inserted, omitting what relates to the Plaintiffs being on the list of contributories, which is not the case here, and substituting, as the subject of indemnity, all expenses which the Plaintiffs have incurred, or may hereafter incur, in respect of the shares not having been registered in the name of the Defendant *Hutchinson*. The Defendant must pay the costs of his appeal, but there will be no costs of the appeal of the Plaintiffs.

SIR C. J. SELWYN, L.J.:—

I am of the same opinion; and I will only add a few words in

(1) Law Rep. 5 Eq. 9.

reference to the case of *Bermingham* v. *Sheridan* (1), on which so great reliance was placed by the counsel for the Appellant. I think that case is wholly distinguished from the present by this one simple fact, that in this case the contract was entered into, as the Lord Justice has pointed out, long before the date of the winding-up order. The contract, it has been clearly proved, would have been carried into execution but for the simple circumstance that the present Appellant refused to accept the transfer upon a ground which, in our judgment, he was not justified in taking—that is, that in the absence of what is called a special guarantee, although he was bound to pay the purchase-money, he was not bound to take a transfer. That, we think, is wholly groundless. The case of *Bermingham* v. *Sheridan* has been explained by the Master of the Rolls himself, in the subsequent case of *Evans* v. *Wood*, where he says (2): "I held, and I think rightly held, that where it was impossible for a person to be put upon the register, the contract could not be carried into execution, because part of the contract was that the name of the purchaser should be put upon the register, and that part could not be performed. But this case differs from that, for this reason, that the Defendant, not from any intentional misconduct on his part, but owing to his accidental absence from home, did not send up the transfer to be registered before the 11th of May, which, if he had done it, would have arrived in time." I do not wish to use any harsh words, but certainly here the whole of the delay was occasioned by the contention on the part of the Appellant, in which, we think, he wholly fails.

The other ground upon which Mr. *Swanston* referred to the case of *Bermingham* v. *Sheridan* was, that he said there was a power in the directors to reject the transfer. That also is explained by the Master of the Rolls. He says (2): "There is this also to be taken into consideration. The directors had an unqualified power to reject any transferee whom they did not choose to put upon the list of shareholders. I assume they might have exercised that discretion in this case, if they had thought fit; but I cannot assume that they would have exercised it in the absence of any evidence on the subject." The present case is much stronger in favour of the Plaintiffs than that, because here Mr. *Swanston*

(1) 33 Beav. 660. (2) Law Rep. 5 Eq. 14.

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himself was bound to admit that the only authority which the directors had is a very limited authority; and there is no evidence whatever to shew that any circumstances existed which would be a justification to them for the exercise of that limited authority.

Solicitors for the Plaintiffs: Messrs. *Lewis, Munns, & Co.*
Solicitors for the Defendant: Messrs. *Reed, Phelps, & Sidgwick.*

L. JJ. 1868 *Feb.* 20.

In re LONDON QUAYS AND WAREHOUSES COMPANY.

Company—Winding-up—Voluntary Winding-up under Supervision—Appointment of Liquidator—Discretion of the primary Judge—Restrictions imposed on the Liquidator—Companies Act, 1862, *s.* 151.

A company passed a resolution for a voluntary winding-up. Before the meeting to confirm it a Petition was presented by contributories praying for a compulsory winding-up, or, in the alternative, that if the resolution should be confirmed, the winding-up might be made subject to the supervision of the Court. This Petition was ordered by the Master of the Rolls to stand over till after the confirmation meeting should have been held, and his Lordship expressed an opinion that the company ought not to appoint any liquidator, and required an undertaking accordingly. At the meeting the previous resolution was confirmed, but no liquidator was appointed. The Petition came on again, and a supervision order was made, and the Master of the Rolls subsequently selected, out of several persons nominated for the office of liquidator, the one who was supported by the smallest number of contributories. A motion was afterwards made by some contributories, and supported by a large majority of the contributories, that the liquidator be removed, or additional liquidators appointed to act with him, but it was not alleged that the person appointed was in any respect an improper person. This motion having been refused by the Master of the Rolls:—

Held, upon appeal, that as the contributories did not at the proper time exercise their right of appointing a liquidator, it became the duty of the Court to appoint one, and, an appointment having been made, the Court of Appeal ought not to interfere with the discretion of the primary Judge.

The Court refused to appoint any additional liquidator, upon the ground that, there being a very hostile feeling between the parties, such an appointment, if one were appointed, would lead to litigation and expense, and if more than one were appointed, would lead to the person originally appointed being outvoted.

An order was made that the liquidator should conduct the winding-up

subject to such restrictions as an official liquidator would in a compulsory winding-up be subject to, except so far as the Court might, on application for that purpose, modify or dispense with such restrictions in any case or class of cases.

IN this case there were three appeals from three orders of the Master of the Rolls.

The *London Quays and Warehouses Company, Limited,* was formed in the year 1865, with a nominal capital of £500,000, in 20,000 shares of £25 each, its principal object being the construction of quays and the building of warehouses in *London*. Between 5000 and 6000 shares were issued and allotted, and £13 10*s*. per share was paid. The affairs of the company became embarrassed, and ultimately, at a general meeting of the shareholders held for the purpose, on the 28th of November, 1867, a resolution was duly passed that the company should be wound up voluntarily. Notice was then duly given of another general meeting, to be held on the 17th of December, to confirm the resolution. On the 5th of December two of the shareholders presented a Petition for a compulsory winding-up of the company, thereby also praying that if the resolution for a voluntary winding-up should be confirmed, an order might be made continuing the voluntary winding-up subject to the supervision of the Court. This Petition contained charges of misconduct against the promoters and against some of the directors of the company in relation to a contract made on behalf of the company for the purchase of some property for the purpose of their undertaking. The Petition came on to be heard before the Master of the Rolls on the 14th of December, and was then ordered to stand over till the 21st of December. All the parties who appeared on the Petition came to an understanding that, in the event of the confirmation of the resolution for a voluntary winding-up, the winding-up should be brought under the supervision of the Court. The Master of the Rolls was of opinion that, in this state of circumstances, the company ought not to make any appointment of liquidators, but that this matter should be left entirely to the Court, and his Lordship required the company's counsel to give an undertaking on their behalf that no such appointment would be made by the company. On the 17th of December the second meeting was held, and the

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resolution to wind up voluntarily was duly confirmed. The meeting was informed by the chairman of the undertaking which had been given by counsel, and though an opinion was strongly expressed by some of the shareholders present that they had a right to choose their own liquidators, they ultimately abstained from doing so, but they passed a resolution recommending a Mr. *Froom* for the office. On the 21st of December the Petition came on again before the Master of the Rolls, and an order was then made that the voluntary winding-up should be continued subject to the supervision of the Court, and it was referred to Chambers to appoint a liquidator. Subsequently, in Chambers, Mr. *Cape*, Mr. *Smart*, and Mr. *Cooper*, all being accountants, were proposed by different shareholders for the office of liquidator. Mr. *Froom* had previously withdrawn. A very large majority of the shareholders supported the nomination of Mr. *Smart*, and Mr. *Cooper* met with the smallest amount of support. The matter was adjourned into Court, and on the 22nd of January the Master of the Rolls selected Mr. *Cooper*, and appointed him liquidator. On the 7th of February a motion was made before the Master of the Rolls on behalf of Mr. *Haigh* and Mr. *James*, who were shareholders, holding respectively 450 and 50 shares, that Mr. *Cooper* might be removed from the office of liquidator, and that a meeting of the creditors and contributories of the company might be summoned and held at such time and place as the Court might direct for the purpose of electing and appointing a liquidator or liquidators to wind up the affairs of the company and distribute its property, or for the purpose of ascertaining the wishes of the creditors and contributories respectively in reference to such appointment, and that some proper person might be named to act as chairman, and to report the result of such meeting to the Court, or otherwise that *F. B. Smart*, *W. Froom*, and *F. W. Haigh*, might be appointed by the Court additional liquidators to act in the winding-up with Mr. *Cooper*. Shareholders, in number forty-eight, and holding among them 4807 shares, had signed a written approval of this application. The total number of shareholders in the company was seventy-one, and the whole number of shares issued less than 6000. This motion was refused by the Master of the Rolls, with costs. From his Lordship's three orders of the 21st of December.

(1) See 2 H. & M. 48.

the 22nd of January, and the 7th of February, appeals were presented, the appeal from the first order being in the name of the company, from the second by Mr. *James*, and from the third by Messrs. *Haigh* and *James*.

Mr. *Baggallay*, Q.C., and Mr. *J. N. Higgins*, for all the Appellants:—

These appeals involve the important question of what was the intention of the Legislature in providing for the carrying on of a voluntary winding-up under the supervision of the Court. We say that it was not the intention of the Legislature to make a voluntary winding-up under supervision equivalent in its effects to a compulsory winding-up. In the case of a purely voluntary winding-up, sect. 141 of the *Companies Act*, 1862, gives the Court power to remove a liquidator "on due cause shewn." This is clearly a power the exercise of which was to be invoked only under very special circumstances. Sections 147 to 152 relate to winding up under supervision, and from them it is plain that what was intended by the Legislature in all these provisions was, that the Court should have regard to the wishes of the creditors and contributories, and that those wishes should be expressed by means of majorities, because the Court is to have regard to the number of votes of the shareholders, and to the amount of the debts of the creditors. The intention was that the Court should not interfere with the right of the shareholders to appoint their own liquidators, but should only exercise a supervision over the acts of the liquidators so appointed. Sect. 151 shews that the intention of a supervision order was to confer on the liquidator powers which he would not otherwise have had, and also to give to other parties a right to have a control over the liquidator by means of the appointment of an additional liquidator. The opinion of Vice-Chancellor *Wood* as to the rights of the shareholders in the case of a purely voluntary winding-up is expressed in the case *In re London and Mercantile Discount Company* (1), and His Honour's observations apply with equal force to a winding-up under supervision. In the present case a small number of shareholders are setting themselves in opposition to the almost unanimous wish of the other shareholders and of the creditors.

(1) Law Rep. 1 Eq. 277.

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[The LORD JUSTICE LORD CAIRNS:—In point of fact, no liquidator was appointed by the shareholders. If the question is merely one of the discretion of the Court, whether *A.* or *B.* should be appointed liquidator, is it not governed by the cases of *In re International Contract Company* (1), and *In re London, Bombay, and Mediterranean Bank?* (2)].

If the Judge of the Court below has exercised his discretion upon a wrong principle, the Court of Appeal will review his decision. Suppose the Judge of the primary Court had said: "I will never appoint an accountant a liquidator," or, "I will always go counter to the wishes of the majority of the shareholders,"—an appeal in such a case would not be an appeal from the exercise of a discretion, but from a discretion exercised upon a wrong principle. We, however, escape from this difficulty, as we have appealed from all the three orders of the Master of the Rolls. Under sect. 141 the Court has power to remove a liquidator appointed by itself, and, at any rate, to appoint additional liquidators. When a voluntary winding-up has been resolved upon, the Court cannot, at the instance of shareholders, make an order for a compulsory winding-up. Can it make any difference that the resolution has been passed, but not confirmed? What has been done here is, in effect, the same as what would have been done in a compulsory winding-up; whereas the object of the provisions of the Act in relation to a voluntary winding-up is, that the liquidator to be appointed should be a person having the confidence of the largest number of the shareholders, and not a person chosen because he has as little connection as possible with the company.

[They referred also to *In re Beaujolais Wine Company* (3); *In re Bank of Gibraltar and Malta* (4); *In re Imperial Bank of China* (5).]

Mr. *Roxburgh*, Q.C., and Mr. *Fry*, for the Respondents:—

[The LORD JUSTICE LORD CAIRNS:—We have no doubt of the propriety of the orders of the 21st of December and the 22nd of

(1) Law Rep. 1 Ch. 523.
(2) Ibid. 1 Ch. 525.
(3) Law Rep. 3 Ch. 15.
(4) Ibid. 1 Ch. 69.
(5) Law Rep. 1 Ch. 339.

January. There remains the order of the 7th of February, on which we wish to hear you, Mr. *Roxburgh*.]

No ground has been shewn for the removal of Mr. *Cooper*. Assuming the supervision order to have been properly made, the appointment of Mr. *Cooper* by the Court is of the same effect as if he had been appointed in a compulsory winding-up. The Court will not interfere with the discretion of the primary Judge in the appointment of a liquidator: *In re International Contract Company* (1); *In re London, Bombay, and Mediterranean Bank* (2). The functions of the company as to appointing liquidators were at an end after the supervision order was made.

[The Lord Justice Lord Cairns:—Are you willing that an order should be made placing Mr. *Cooper* under the same restrictions as an official liquidator would be subject to in a compulsory winding-up, except so far as the Court should think fit to dispense with those restrictions?]

Yes.

Mr. *Baggallay* was then called on to reply:—

The effect of the order suggested would be to make a compulsory order under a different form. Sect. 152 shews that a winding-up under supervision was meant to be something different from a compulsory winding-up. The order proposed would not be so beneficial as an order for compulsory winding up; we should have all the hindrances and none of the advantages of an order in that form.

Lord Cairns, L.J.:—

This case comes before us under circumstances which are, in some respects, peculiar. There was, in the first instance, a resolution of the company that it should be wound up voluntarily. In the interval between that resolution and the resolution which was necessary to confirm it, a Petition was presented to the Court praying for a compulsory winding-up, or if, before the Petition should be heard, the second resolution should have been passed, then for a continuance of the voluntary winding-up under the supervision of the Court. In point of fact, the Petition came on to be heard before

(1) Law Rep. 1 Ch. 523. (2) Law Rep. 1 Ch. 525.

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the second resolution was passed, and before the day appointed for the meeting at which it was to be passed. The Court, being made aware that there was to be this second meeting, ordered the Petition to be adjourned, and it is clear from the notes of what passed upon that occasion, and, indeed, it is not disputed, that the Court ordered it to be adjourned with an understanding that if the resolution for a voluntary winding-up should be confirmed, then the Court would adopt the voluntary winding-up, and would make an order to carry it on under supervision. There is no doubt, therefore, that the shareholders of the company had clear and distinct notice that, if they confirmed their resolution for a voluntary winding-up, they confirmed it for a voluntary winding-up which would then pass under the supervision of the Court.

But upon the occasion of the Petition being brought on in this way before the Court, the Master of the Rolls intimated his opinion that, in confirming the resolution for a voluntary winding-up, the company ought to abstain from appointing any liquidator of their own, and should leave the appointment of liquidator to the Court. Whether that direction of the Court, or that intimation of the opinion of the Court, could or could not have been objected to on the part of the company, it is unnecessary now to inquire, because in point of fact it was not objected to. The second meeting was held, the resolution for voluntary winding-up was confirmed, and there the company stopped; they appointed no liquidator.

Now, if the company had appointed a liquidator, it is perfectly clear from the Act of Parliament that that liquidator must have continued so long as the voluntary winding-up was maintained. The Court might have removed him, but only for cause shewn; and, unless cause were shewn, he must have remained the liquidator of the company, liable of course to have associated with him some additional or other liquidator or liquidators appointed by the Court. The company, therefore (whether they were constrained to do it or not, I repeat, we need not now inquire), omitted that opportunity which would have enabled them to have a liquidator of their own choosing, without any person being able to prevent them.

In that state of things the matter comes back to the Court, and the Court then, following up what had been intended, adopted the voluntary winding-up, and made an order for its being conducted

under the supervision of the Court. Under these circumstances, in my opinion, there being no liquidator, the case clearly fell to be one in which the Court had the jurisdiction and the obligation to appoint a liquidator, and then the question who should be appointed became, as in every other case where the Court has to appoint a liquidator, a question for the discretion of the Judge by whom the appointment was to be made. That discretion, by the 149th section, he might exercise, but was not obliged to exercise, by concurring in the wishes of the creditors or contributories, proved in the manner pointed out by that section. In this particular case the Master of the Rolls had before him the wishes of the shareholders, so far as and in whatever form they had been intimated, and in the exercise of his discretion he appointed a gentleman whom he thought the best qualified and fitted for the office, and as to whose personal qualifications for the office no objection whatever is made.

Now that being so, it would, in my opinion, be a departure by this Court from the principles which have been laid down in two cases cited, *In re International Contract Company* (1), and *In re London, Bombay, and Mediterranean Bank* (2), decided by the present Lord Chancellor in the last year, if we, upon a question of discretion as to the *delectus personæ*, were to take a different view from that adopted by the Master of the Rolls. Whether we ourselves, in the first instance, would or would not have appointed Mr. *Cooper* (although I am far from saying that we should not have appointed him, as the Master of the Rolls did), it was, I repeat, in my opinion, a question of discretion, and not the less a question of discretion because there was here a voluntary winding-up than if there had been a compulsory winding-up. It is perfectly true that in the case of a voluntary winding-up the Act of Parliament points out that the object is that shareholders should have a larger voice than in the case of a compulsory winding-up, but they omitted the opportunity which the Act gave them of exercising that voice by appointing their own liquidator before the matter was transferred into Court at all. So far, therefore, as regards the appointment of Mr. *Cooper*, and as regards the motion to remove him, it appears to me that the motion must fail.

Now the only argument of the Appellants that has pressed on

(1) Law Rep. 1 Ch. 523. (2) Law Rep. 1 Ch. 525.

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my mind is this, that you have here a large body of shareholders who were unanimous in the desire to have some person appointed by themselves, in whom they had confidence, and that, whereas in a compulsory winding-up the official liquidator would have as to every act to obtain the consent and the direction of the Court, and thereby a protection would be cast round the shareholders and creditors, here Mr. *Cooper*, being a liquidator under a voluntary winding-up, will be at liberty to exercise all his powers, unless restricted, without coming to the Court for direction as an official liquidator must come. The mode in which the Appellants proposed to cure this, was to associate with Mr. *Cooper* one liquidator or more to be named by the shareholders. I think there would be great inconvenience in that course. It is quite true that the Act of Parliament contemplates the association of two or more liquidators together. At the same time, from what we see of the state of feeling that has arisen in this case, it is clear that if one liquidator, or more, appointed by the shareholders, were to be associated with Mr. *Cooper*, there would be constant dissensions and disagreements between the liquidators. If they were two in number they would be divided one against one. If they were three, two being appointed by the shareholders, and Mr. *Cooper* not appointed by the shareholders, it would virtually be giving the command of the liquidation to the shareholders, and Mr. *Cooper's* voice would be reduced to silence. The result would be in either case constant appeals to the Court, not for direction merely, but appeals upon questions of antagonism, as to who was right, or who was wrong, in the course which was proposed to be taken, and very great expense and inconvenience would, I think, be occasioned.

I think, however, that the difficulty can be avoided, and the amount of protection which the shareholders are entitled to can be secured to them, by an order in the form which I have already suggested, appointing Mr. *Cooper* liquidator "to conduct the winding up of the company subject to such restrictions as an official liquidator would in a compulsory winding-up be subject to, except so far as the Court may, upon an application for that purpose, modify or dispense with such restrictions in any case or class of cases." An order restricting the powers of the liquidator in this way appears to me to be clearly within the jurisdiction of

the Court, under the 151st section, which provides that liquidators appointed to conduct a winding-up under supervision may, subject to any restriction imposed by the Court, exercise their powers without the sanction or intervention of the Court. The Respondents have no objection to this form of order, and we are prepared, if the Appellants wish it, to vary, in the way I have suggested, the order appointing Mr. *Cooper*. If, on the other hand, they prefer that things should remain as they are, so they may remain. If the alteration is made, we will dismiss the first of these appeals, with costs, and with regard to the appeals on the other two orders, we will direct the costs of all parties to be costs in the winding-up. On the other hand, if the shareholders, upon consideration, do not wish this variation in the order to be made, then all the appeals will be dismissed with costs.

SIR C. J. SELWYN, L.J.:—

I have very few words to add. We must assume that the hearing of the original Petition was duly advertised, and consequently that all persons interested in the affairs of this company were duly summoned to attend on that occasion, when the prayer of the Petition was in the alternative, either for a compulsory winding-up, or for a winding-up under the supervision of the Court. In the presence, then, or in the assumed presence, of all persons interested, the Petition was ordered to stand over, in order that a second meeting might be had, and at that meeting there was no concealment or surprise. That which had taken place in Court was distinctly referred to at the meeting, and with full knowledge of all the facts the meeting confirmed their previous resolution, and did not appoint a liquidator.

Under these circumstances the Court had, in my opinion, power to appoint a liquidator, and the Master of the Rolls in the exercise of his discretion has appointed Mr. *Cooper*. No personal objection is raised against Mr. *Cooper*, and, upon the authorities to which the Lord Justice has referred, I think that we cannot properly interfere with the discretion of the Master of the Rolls as exercised in the appointment of Mr. *Cooper*. I agree with the Lord Justice that it would be an equally if not a more inconvenient course for us to adopt the alternative which has been sug-

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gested, and interfere with the discretion of the Master of the Rolls by appointing an additional liquidator or liquidators; for in the one case, as we have been distinctly informed at the bar that there is great antagonism between the view of the persons who supported Mr. *Cooper*, and the view of the Appellants, we should, by appointing one additional liquidator, be introducing those antagonistic elements into that which is now the executive of the company, and which is now engaged in the difficult and delicate task of winding up its affairs. In the other event of our appointing two or more liquidators, as the Lord Justice has pointed out, we should be virtually superseding Mr. *Cooper*, and undoing what has already been done.

Solicitors for the Appellants: Messrs. *Lewis, Munns, Nunn, & Longden.*

Solicitor for the Respondents: Mr. *P. H. Lawrence.*

L. JJ. 1868 *Feb.* 22

Ex parte PILKINGTON. *In re* WEBSTER.

Bankruptcy Act, 1861, *s.* 136—*Resolution of Creditors—Unjust and Inequitable Resolution.*

68 L J 687
5 Ch 222

The trustee of a creditors' deed took possession of a house which belonged to the debtor, and of which the debtor had the key. The debtor brought an action against him for assault, for conversion of certain tools in the house, and for breaking into the house, and obtained a verdict on the first two grounds, but failed on the third. The trustee included in his accounts the costs paid by him to the Plaintiff, and his own costs of the action; and the accounts were approved by a majority in number and value of the creditors assembled in a meeting called for the purpose of examining them. A creditor afterwards applied to the Commissioner to have these items disallowed, and to oblige the trustee to pay a further dividend:—

Held (affirming the decision of the Commissioner), that the costs must be allowed, for that the resolutions mentioned in the *Bankruptcy Act*, 1861, s. 136, need not be resolutions come to before the Commissioner, and that there was nothing so unjust or inequitable in a resolution sanctioning the allowance as to authorize the Court to pronounce it not to be binding.

THIS was an appeal by a creditor from an order of Mr. Commissioner *Jemmett*, allowing to the trustees of a creditors' deed certain costs.

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Ex parte PILKINGTON. *In re* WEBSTER.

On the 7th of December, 1864, *Webster*, a builder, executed a deed assigning his property for the benefit of his creditors, which deed was duly registered under the *Bankruptcy Act*, 1861. The amount received by the trustees under it was £561 10*s.* 2*d.* The debts amounted to £459. The trustees paid a dividend to the creditors of 9*s.* 1*d.* in the pound. On the 30th of September, 1867, a meeting of creditors was called, and the accounts laid before them, with full explanation as to the items. A large majority in number and value of the creditors then passed a resolution approving of the accounts, and expressing their high satisfaction with the management of the estate by the trustees.

The Appellant, who was a creditor for a small amount, took out a summons in bankruptcy calling upon *Cooper*, the principal acting trustee, to be examined as to his receipts and payments. The only important objection which he took to the accounts arose as follows: The chief part of the debtor's property consisted of some cottages, mostly unfinished, in one of which he lived. After the execution of the creditors' deed he left the cottage, but took away the keys, and on *Cooper's* going to ask for them refused to give them up. High words then passed between *Cooper* and *Webster* and his wife, and a scuffle ensued, *Cooper's* account of which was that Mrs. *Webster* assaulted him, and that he defended himself without unnecessary violence. *Cooper* obtained possession of the cottage without the keys, and retained, as *Webster* alleged, certain tools which were there, and belonged to *Webster* and not to the trustees. *Webster* and wife then brought an action against *Cooper* in the *Salford* Court of Record, the declaration containing five counts:—1, for an assault on Mrs. *Webster*; 2, for conversion of *Webster's* tools; 3, for detaining the tools; 4, for breaking into the cottage; and 5, for money had and received; and claiming £10 under the first count; the tools or their value, and £5 for their detention, under the 3rd count; and £30 under the rest of the declaration. The Plaintiffs obtained a verdict of £5 for the assault, and £7 10*s.* for conversion of the tools. The verdict on the other counts was for the Defendant. The Plaintiff thus being entitled to his costs, *Cooper* paid him the costs and damages, amounting to £38 18*s.* 3*d.* This sum, together with the costs, about £45, incurred by *Cooper* in defending the action, he charged against the estate.

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Pilkington, after the examination of *Cooper* had been had, moved that the trustees might be ordered to declare a further dividend, and to have the charges relative to the action disallowed in the accounts. The learned Commissioner considered that as the creditors, at a meeting, had passed a resolution approving of the accounts, they ought not to be disturbed, but expressed an opinion that the damages for the assault ought not to have appeared in them. The trustees undertook to withdraw this item, and the motion was refused.

Mr. *Jordan*, for the Appellant.

Mr. *De Gex*, Q.C. (Mr. *Torr* with him), for the trustees, referred to the *Bankruptcy Act*, 1861, s. 136.

Mr. *Jordan* was then called upon to reply as to the effect of that section, and contended that the resolutions referred to in sect. 136 must be resolutions come to before the Commissioner; and that, assuming the resolution to be such as was intended by the section, the allowance of these items was so unjust and inequitable that the resolution sanctioning it could not be regarded.

LORD CAIRNS, L.J. :—

On the opening of this case I was struck with the singular character of the items complained of; and if the question were open whether they ought or ought not to be allowed, I should require time to consider it. But the question is, whether the proceedings of the creditors do not, under the 136th section, conclude the matter. The Commissioner had jurisdiction, but it could only be exercised subject to the provisions of that section; and I cannot read that part of it which refers to resolutions by a majority of creditors as referring only to resolutions which have been formally come to before the Commissioner; it must, I think, be held to apply to any resolutions come to by the requisite majority at any meeting of which the creditors have had proper notice. It is not disputed that in this case the resolution approving of the accounts was come to by a majority; that it was come to at a meeting held for the purpose of examining the accounts, and with full infor-

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mation as to the nature of the items; and the only ground which has been urged for disturbing the resolution is, that the allowance of these items is so unjust and inequitable that the Court ought to disregard a resolution approving of them. I cannot view the matter in this light; it appears to me to be one in which a majority of creditors might fairly be left to decide what was proper; and I think that this appeal ought to be dismissed with costs.

SIR C. J. SELWYN, L.J.:—

The dispute between *Webster* and the trustee in this case did not originate in the detention of *Webster's* tools, in which the trustee was found to be in the wrong, but in the steps taken by the trustee to obtain possession, for the benefit of the creditors, of property to the possession of which he was entitled; and I cannot say that the allowance of the costs was so unreasonable as to justify our setting aside the resolution of the majority of creditors approving of it.

Solicitors: Messrs. *Chester & Urquhart;* Messrs. *Marsland & Addleshaw, Manchester.*

THOMAS *v.* BUXTON.

L. JJ.
1868
April 17.

Practice—Bankruptcy of Plaintiff after Decree—Revivor by Defendant.

Where a sole Plaintiff becomes bankrupt after decree, and his assignees decline to revive the suit, the Defendant may obtain the common order to revive.

THIS was a suit for the administration of a testator's estate, instituted by one of the residuary legatees. After decree, the sole Plaintiff became bankrupt, and his assignee had been served by one of the Defendants with notice to revive the suit, but declined to do so.

Mr. *Baggallay*, Q.C., for the Defendant, accordingly asked for

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the common order to revive, under the 52nd section of the 15 & 16 Vict. c. 86. He stated that he had made the application to the Master of the Rolls, but his Lordship had refused it, following his own decision, in *Maw* v. *Pearson* (1).

The LORDS JUSTICES made the order, observing that as the application was made *ex parte*, the other party might apply to set it aside.

Solicitors: Messrs. *Gregory, Rowcliffes, & Rawle.*

L. J. C. 1868 *Jan.* 31; *Feb.* 8. L. JJ. 1868 *Feb.* 22.

Ex parte STALLARD. *In re* HOWARD.

Bankruptcy Act, 1861, *ss.* 221, 223—*Prosecution of Bankrupt—Costs.*

Where there is reasonable evidence to go to a jury of a bankrupt having committed offences within the *Bankruptcy Act*, 1861, s. 221, a prosecution will be directed, and the Court will not try the question whether the evidence is sufficient to induce a jury to find him guilty, though a prosecution will not be directed on mere suspicion.

The costs of a successful appeal from an order of the Commissioner refusing to direct a prosecution cannot be ordered to be paid out of the Chief Registrar's account; for having been incurred before a prosecution has been directed, they are not "expenses incurred by such prosecutor" within the meaning of sect. 223.

THIS was an appeal by the trade assignee from a decision of Mr. Commissioner *Hill*, refusing to direct a prosecution of the bankrupt.

The bankrupt had been a traveller for a firm of wine-merchants in *London*, at a considerable salary, for which a commission of £5 per cent. was afterwards substituted. About April, 1865, he began to purchase wines on his own account, which he used to sell by auction, stating them to be the property of persons whose names he gave, such names generally being fictitious. He bought at six months' credit, and sold without reserve, and this course of dealing resulted in a ruinous loss. It appeared that he had made false representations as to his mode of carrying on business to some of the

(1) 12 W. R. 701.

persons who had sold him goods on credit within three months from his bankruptcy, and wine had been sold at a heavy loss in the above manner within the same period. The assignee applied to the Commissioner for an order directing the prosecution of the bankrupt, on the ground that he had been guilty of offences within the *Bankruptcy Act*, 1861, s. 221, clauses 10 and 11. The learned Commissioner having declined to make the order (1), the assignee appealed.

(1) The following is from a short-hand note of the learned Commissioner's judgment:—

"I have now to dispose of an application on the part of Mr. *Stallard*, the trade assignee, for an order to prosecute the bankrupt for offences committed against the *Bankruptcy Act*, 1861. It appears from the case of *Ex parte Still* (9 Jur. (N.S.) 7; 7 L. T. (N.S.) 406) as well from the reason of the thing, that Courts of Bankruptcy must be extremely cautious in granting such orders, and must require some near approach to certainty that they will result in convictions, the costs being thrown by law upon public funds. For that and higher reasons they only act upon a *primâ facie* case so proved as if unrebutted and unexplained will be sufficient to convict. Such proof, whether as regards the 10th or the 11th branch of the 221st section, I am unable to find. Under the 10th branch the credit must have been obtained under "the false colour and pretence of carrying on business and dealing in the ordinary course of trade;" that is, as I construe the words, the vendor must have parted with his goods on the faith of such false pretences. Such is the test which has been always applied to cases of obtaining goods under false pretences. It has never been considered enough that there should be a false pretence, but it must be also proved that the vendor acted on such false pretence. I think this cannot be inferred, even if it can be fairly suspected, in either of the two cases to which my attention has been called. In the case of Mr. *Joseland*, of *Worcester*, it appears that he had begun to trust the bankrupt before the bankrupt had made any representations as to his course of trading. Mr. *Joseland's* faith in the bankrupt was founded on the result of a reference to the present assignee, and in that of an application to Messrs. *Strachan & Co.*, a *London* house of eminence, of which the bankrupt was agent in the sale of sherry wines. This house reported that the bankrupt was a person to whom it would be safe to sell on credit. It is true that afterwards, and before the bankrupt's last purchase, statements were made by the bankrupt to Mr. *Joseland* which, I am of opinion, gave a false representation of his course of trading. But I cannot come to the conclusion that it was because of such false representations that the credit as to that last supply of goods was given. The other case is that of Messrs. *Wright & Sons*, of *Bristol*, which labours under a similar defect; the representations relied on being contained in two letters, the earliest of which is the 24th of June; while it appears from the proof of their debt, that their sales began at an earlier period, but upon what footing the dealings commenced is not shewn. It cannot, therefore, be inferred that it was on false representations; nor can it be inferred that the representations afterwards made furnished the ground

(1) 9 C. B. N. S. 182

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Mr. *De Gex*, Q.C., and Mr. *Edlin*, for the assignee.

Mr. *Druce*, Q.C., and Mr. *Yate Lee*, for the bankrupt, referred to *Reg.* v. *Manser* (1); *Reg.* v. *Boyd* (2); *Reg.* v. *Lee* (3); *Rex* v. *Goodhall* (4); *In re Still* (5).

LORD CAIRNS, L.J.:—

Whatever may be the result of criminal proceedings against the bankrupt, it is impossible not to agree in the observations of the learned Commissioner as to the moral aspect of his conduct—conduct which cannot be looked upon by the Court otherwise than with the strongest reprobation. But the present question is, whether the Court ought to direct criminal proceedings to be taken by the assignee. I desire to keep within the limits of the rule laid down by Lord *Westbury* in *In re Still*. I think that no criminal prosecution ought to be directed on the ground of mere suspicion, but if there be reasonable evidence of the guilt of the

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on which the dealing was continued. With regard to the 11th branch, as the evidence now stands, the case will turn upon the construction of the words "in the ordinary way of his trade." The 10th branch speaks of "the ordinary course of trade," omitting the pronoun. It must, I think, be presumed that this change of expression is intentional, and imports a change in the meaning of the words "ordinary way of trade" to the ordinary way of the particular trader, and provides for a non-fraudulent deviation from the ordinary way of the trade to which the trader belongs. Without such limitation, an honest man who had established a trade deviating in its usages from that of other traders in the same line of business, might be exposed to a prosecution for an innocent act; and although he would be under the protection of the words which make it imperative that what is done shall be done with intent to defraud his creditors, yet he would be still left in a very unsafe position. I am far from feeling perfect confidence in the construction which I have adopted, but I could not grant the order unless I were well convinced that the opposite construction contended for by Mr. *Edlin* must prevail—viz., that "his trade" means the trade of which he is a member. Such a construction offers no reason why the Legislature should have departed from the words used in the 10th branch. In conclusion, I think it right to express my opinion, that the bankrupt has conducted his dealings in a manner which cannot be too severely censured, and that he ought to feel deep remorse for the enormous losses to which he has subjected his creditors. The order must be refused.

(1) 4 F. & F. 45.
(2) 5 Cox, Crim. Ca. 502.
(3) 9 Ibid. 304.
(4) Russ. & Ry. 461.
(5) 9 Jur. (N.S.) 7; 7 L. T. (N.S.) 406.

bankrupt, I think that, if no private prosecution is pending, the Court ought to direct proceedings to be taken, and that it is not the duty of this Court to decide whether that evidence will be sufficient to convince a jury that the bankrupt is guilty. It is the duty of the jury to decide as to its weight, especially in a case which turns upon fraudulent intent, the principles applicable to which cannot be better expressed than in *Reg.* v. *Manser* (1). The question to be tried is, whether the bankrupt has done any of the acts mentioned with the intent specified. Taking the view I do, I think that it would be improper for me to enter into any narrative of the facts; but I must say thus much, that, on the bankrupt's own account of his dealings, there is, in my opinion, a reasonable case to go before a jury under sect. 221, clauses 10 and 11—such a case, that if I were to refuse to send it before a jury I should be making those clauses nugatory. An order will, therefore, be made directing the assignee to cause the bankrupt to be brought before a Court of competent jurisdiction to answer the charges against him.

The assignee will have his costs of the appeal out of the estate.

Feb. 22. On this day Mr. *De Gex*, Q.C., for the assignee, asked the Lords Justices that the costs of the appeal might be ordered to be paid out of the Chief Registrar's Account, there being no estate. He referred to *Ex parte Spooner* (2).

LORD CAIRNS, L.J.:—

We have no authority to deal with this fund except under sect. 223 of the Act, and that section must be construed according to the words contained in it. The words are:—"Any expenses incurred by such prosecutor other than those so defrayed in accordance with the next following clause, shall be paid out of the account intituled, 'The Chief Registrar's Account.'" The costs now asked for are not costs of the prosecutor, but costs incurred anterior to the time when he was authorized to assume that office,

(1) 4 F. & F. 45. (2) Law Rep. 3 Ch. 259.

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the costs of a proceeding to make him prosecutor. Whether it would have been right or not for the Legislature to authorize these costs to be paid out of the Chief Registrar's Account, it has not done so. If I may be allowed to say so, I quite concur with the decision of the Lord Justice *Rolt* in *Ex parte Spooner* (1); but the costs there allowed were expenses incurred by the prosecutor, though not costs of the prosecution.

SIR C. J. SELWYN, L.J., concurred.

Solicitors for the Assignee: Messrs. *Gregory & Co.*
Solicitor for the Bankrupt: Mr. *J. A. Redhead.*

L. J. C. 1868 *Jan.* 16.

In re BLAKELY ORDNANCE COMPANY.

STOCKEN'S CASE.

Company—Calls—Forfeiture for Non-payment—Interest—Statute 3 & 4 Will. 4, c. 42, s. 28.

4 Ch 269 — 272 5 Ch 64

By the articles of association of a company overdue calls were to carry interest at 25 per cent., and, by clause 50, it was provided that the forfeiture of a share should involve the extinction at the time of the forfeiture of all interest in, and all claims and demands against, the company in respect of the share, and all other rights incident to the share, but that the shareholder should, notwithstanding, be liable "to pay to the company all calls owing on such share at the time of such forfeiture":—

Held (affirming the decision of the Master of the Rolls), upon the construction of the articles, that a member whose shares had been forfeited for non-payment of a call was liable to pay the call, but not any interest upon it:

Held, also, that interest was not payable under the statute 3 & 4 Will. 4, c. 42, s. 28, no notice having been given after the forfeiture claiming interest on the sum made payable by the 50th clause.

THIS was a motion by the official liquidator of the *Blakely Ordnance Company, Limited*, by way of appeal from a decision of the Master of the Rolls (2).

By the articles of association, calls were to carry interest at £25 per cent. per annum from the day appointed for payment until

(1) Law Rep. 3 Ch. 259. (2) Law Rep. 5 Eq. 6.

actual payment; and the 45th clause provided that after fourteen days' default, notice of the call should be repeated, and after seven days' further default the board might sue for the call with £25 per cent. interest from the day appointed for payment. The 50th clause provided that "the forfeiture of any share shall involve the extinction at the time of the forfeiture of all interest in, and all claims and demands against, the company in respect of the share, and all other rights incident to the share; but any member whose shares have been forfeited shall, notwithstanding, be liable to pay to the company all calls owing on such shares at the time of such forfeiture."

On the 29th of August, 1865, notices of a call of £5 per share, made on the preceding day, and payable on the 14th of September, 1865, were issued by the directors to the shareholders. These notices stated that if the amount of the call was not paid on or before the 14th of September, 1865, interest at £25 per cent. per annum would be charged from that day till the day of payment, in conformity with the articles of association. *Stocken*, who was an original allottee of fifteen shares, did not pay the call, and on the 4th of October, 1865, a further notice was issued, applying for payment of the call, with £25 per cent. interest, and intimating that the shares would be liable to be forfeited if payment were not made on or before the 14th instant. *Stocken* not having paid the call, his shares were forfeited by the directors on the 14th of December, 1865.

An order having afterwards been made to wind up the company, *Stocken*, on the ground of the forfeiture, successfully resisted being placed on the list of contributories. After this, on the 7th of June, 1867, he received a notice in writing, calling upon him to pay to the official liquidator the amount of the call which was due at the time of forfeiture, "and interest thereon, calculated according to the articles of association and the notice of call issued to the shareholders."

It was arranged that the question should be tried on a summons by *Stocken* that the liquidator might be at liberty to receive the call without interest. This summons was adjourned into Court, and the Master of the Rolls decided that no interest was payable.

L. J. C. 1868

STOCKEN'S CASE.

Mr. *Baggallay*, Q.C., and Mr. *J. N. Higgins*, for the official liquidator:—

We submit that under clause 50, only the rights of the shareholder against the company are extinguished. At all events, the forfeiture could not extinguish the right to interest already accrued due, so, if we are not entitled under clause 50 to interest up to the time of payment, we are entitled to it at £25 per cent. up to the time of forfeiture. If not, we are entitled to interest at £5 per cent. under 3 & 4 Will. 4, c. 42, s. 28, from the 14th of September, 1865, when the call became payable.

Mr. *Jessel*, Q.C., and Mr. *C. T. Simpson*, for *Stocken*, were desired by the Court to confine themselves to the question on the effect of the statute:—

The case is not within the Act. The call was payable by virtue of an instrument in writing, namely, the articles; but it was not payable under them at a certain date. Nor has there, to supply the defect, been such a demand as the statute requires: *Harper* v. *Williams* (1).

Mr. *Baggallay*, in reply:—

I submit that the call was payable at a certain time under a written instrument, for that the articles, which create the obligation to pay, and the notice of call, which fixes the day of payment, constitute for this purpose one written instrument. Then there was a demand in writing claiming interest, by the notices which preceded the forfeiture.

[The LORD JUSTICE LORD CAIRNS:—Is not the liability to pay under clause 50 a new liability, to which a notice before forfeiture has no reference?]

I submit that the effect of clause 50 is not the creation of a new liability, but the saving of an old one.

LORD CAIRNS, L.J.:—

I think that the 50th clause of the articles of association, whether it be called a penal clause or not, must receive a strict

(1) 4 Q. B. 219.

construction, and that the rights of the parties on one side and the other must depend upon its construction. I also think it very clear that the principle upon which a high rate of interest was assigned to unpaid calls was, that in this trading company the profits might have been large, and unless a high rate of interest was put on unpaid calls, it might suit a shareholder to remain a defaulter for calls, getting a large dividend, and being called on to pay no interest at all, or interest only at the current rate. That consideration would cease to apply when a forfeiture of the shares occurred, and that might be a reason why clause 50 should not provide for interest being paid after forfeiture. But whether that be so or not, the construction of that clause, as it seems to me, is reasonably clear. The first part runs thus:—"The forfeiture of any share shall involve the extinction at the time of the forfeiture of all interest in and all claims and demands against the company in respect of the share and all other rights incident to the share." Now, suppose the clause had stopped there, and there had been nothing more in the articles. I apprehend that clearly no action could, after forfeiture, have been maintained for the recovery of the calls previously due, and that for two reasons. First, I think so in consequence of the words used, namely, that all rights incident to the share are extinguished, which words cannot, in my opinion, be confined to rights against the company, but must extend to all rights incident to the share. In addition to that, I am strongly disposed to think that the mere fact of a duly authorized forfeiture of shares without anything in the articles defining the effect of forfeiture, would of itself, in the very nature of things, render any proceedings at law for past calls incompetent, because such proceedings must, I apprehend, be on the footing that the person sued was a shareholder in the company; and if his interest in the company had been destroyed, it is by no means clear that the action could be maintained.

The following part of the 50th clause shews that the construction which I have put upon the first part is the construction put on it by the framer of the articles; for he evidently thought that if he stopped there any right to proceed for calls would be gone, and he therefore introduces a provision which seems to me to be in substance and in words the creation of a new right. The words are

L. J. C. 1868 STOCKEN'S CASE.

these: "but any member whose shares have been forfeited shall notwithstanding be liable to pay to the company"—what? He is not to be liable for anything for which this clause does not say he is to be liable, and what it is said he is to be liable for is this: "to pay to the company all calls owing on the shares at the time of such forfeiture;" not saying a word as to interest. In the earlier clauses, where it was intended that interest should be recovered, it was repeated. For example, although the 44th clause defines the liability to pay interest, the 45th clause proceeds thus: "After fourteen days' non-payment of any call in respect of any share, notice of the call shall be repeated; and after seven days' further non-payment thereof, the board may sue the defaulting member or shareholder for the amount unpaid, with £25 per cent. per annum interest thereon from the day appointed for payment thereof." The 50th clause stops short of that; it simply gives an independent right to recover after forfeiture a sum due at the time of forfeiture. That is the sum which it appears to me can be recovered, and nothing beyond that.

I thought at first (though the point seems not to have been considered in the Court below), that the 28th section of the 3 & 4 Will. 4, c. 42, might have some bearing upon the question; but upon consideration it appears to me that it has not. The sum for which the company will sue is a sum payable by virtue of a written instrument no doubt, namely, by virtue of the articles of association. It is under the 50th clause that the right to recover arises, but under that clause no time certain is fixed for payment. On the other hand, the demand made was not a good demand for payment within the Act, because the demand must be after forfeiture for payment of the sum the liability to pay which arose under the 50th clause at the time of the forfeiture.

I think, therefore, that no interest is payable; that the order of the Master of the Rolls was correct; and that this appeal must be dismissed with costs.

Solicitors for Official Liquidator: Messrs. *Lewis, Munns, & Co.*
Solicitors for *Stocken:* Messrs. *Brooksbank & Galland.*

BOVILL *v.* HITCHCOCK.

L. J. C.
1868
Jan. 14.

Practice—Right to a Jury—Trial of Legal Right—Patent Case.

The Defendant to a bill for an injunction to protect a legal right cannot *ex debito justitiæ* require to have such right tried by a jury; for the Court, before the statutes 21 & 22 Vict. c. 27, and 25 & 26 Vict. c. 42, sent such cases to be tried at law, not in order that they might be tried by a jury, but because the Court, having no jurisdiction to try a legal right, required to have the judgment of a Court of common law upon it.

Application for a jury in a patent case refused.

The decision of the Master of the Rolls affirmed.

THIS was a motion by the Defendants by way of appeal from an order of the Master of the Rolls refusing an application that certain questions of fact might be tried by the Court with a special jury.

The bill was filed to restrain the infringement of a patent. Issue having been joined, an order was, on the 22nd of July, 1867, made in Chambers, on the application of the Defendants, under the General Order of the 5th of February, 1861, Rule 3, that the evidence in chief should be taken *vivâ voce* at the hearing of the cause as to the facts or issues mentioned in the order, most of which were questions of fact bearing on the validity of the patent.

In December, 1867, the Defendants moved before the Master of the Rolls that the trial of the questions of fact mentioned in the order of the 22nd of July might be tried by the Court with a special jury. The Master of the Rolls, on the 14th of December, refused the motion with costs. It was, during the argument of the motion, called to His Lordship's attention that in a suit of *Bovill* v. *Goodier*, relating to the same patent, he had expressed a strong inclination of opinion in favour of the validity of the patent.

Mr. *Little*, Q.C., and Mr. *North*, in support of the appeal motion:—

We submit that the Defendants are entitled, as a matter of right, to have these questions of fact tried by a jury. Before the recent statutes, 21 & 22 Vict. c. 27 (*Cairns' Act*), and 25 & 26 Vict. c. 42 (*Rolt's Act*), a Defendant in a patent suit had an absolute

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right to require the Plaintiff to establish his patent at law: *Newall* v. *Wilson* (1).

[The LORD JUSTICE LORD CAIRNS :—You need not cite cases in support of that undoubted rule.]

This involved the right to have the case tried before a jury, and this right, we submit, is not taken away by the statutes. If the case were one where the Court of Chancery had a concurrent jurisdiction with the Courts of common law, no doubt the Court might try the case in any way conformable to its own course of procedure; but the case is one where the Court merely interferes to protect a legal right, the existence of which depends on complicated questions of fact, and such questions ought to be tried in the way in which a Court of law tries disputed facts: *Eaden* v. *Firth* (2); *Davenport* v. *Goldberg* (3). In *George* v. *Whitmore* (4) it does not appear that the case was one in which this Court had not concurrent jurisdiction; and *Morrison* v. *Barrow* (5) certainly was not a case in which relief was only sought in consequence of a legal right. Those authorities, therefore, do not settle the point against us. *Williams* v. *Williams* (6) supports our view.

[The LORD JUSTICE LORD CAIRNS:—In a suit to establish a will, the Court requires the verdict of a jury to satisfy itself, and such a case has no analogy to one where the right had to be established by a judgment at law.]

Again, the Master of the Rolls, in a suit of *Bovill* v. *Goodier*, having expressed a strong leaning in favour of the patentee, it is better that the question should not be tried before him without a jury.

[*Fernie* v. *Young* (7) was also referred to.]

Mr. *Baggallay*, Q.C., and Mr. *F. Harrison*, for the Plaintiff, were not called upon.

LORD CAIRNS, L.J. :—

This appeal is rested on two grounds—the first being, that as before the course of the Court of Chancery was altered, so as to

(1) 2 D. M. & G. 282.
(2) 1 H. & M. 573.
(3) 2 Ibid. 282.
(4) 26 Beav. 557.
(5) 1 D. F. & J. 633, 639.
(6) 33 Beav. 306.
(7) Law Rep. 1 H. L. 63.

throw upon the Court the duty of deciding questions which, according to its former course, were sent to be tried at law, a question of this nature would have been tried before a jury, so now either party has a right to insist on its being so tried. I cannot accede to this argument. The effect of the Acts is to impose on the Court the duty of deciding these questions, and, in the absence of any direction to the contrary in the Acts, the Court must try them according to its ordinary course of practice. If the Court thinks it best that a question should be tried before a jury, a jury can be had; but if, in the opinion of the Court, a trial without a jury is preferable, neither party can claim a jury as a matter of right. It is a fallacy to say that under the old practice the Court required a legal question to be tried by jury. What it required was the judgment of a Court of common law. In most cases it was a necessary incident to proceedings at law that there should be the verdict of a jury before judgment; but these cases were sent to law, not that they might be tried by jury, but because this Court had no jurisdiction to decide upon legal rights.

Secondly, it was urged that a trial ought to be had before a jury because the Master of the Rolls, in a former litigation between the present Plaintiff and another party, expressed a strong opinion in favour of the patentee, as regarded the questions then in dispute. If that has any bearing on the present case, it would rather go to shew that the trial ought to be before another Judge than before the Master of the Rolls with a jury. His Lordship, after having had his former expressions called to his attention, stated it to be his opinion that this case could be conveniently and properly tried before him, and more conveniently without than with a jury, and it has not been urged that there was anything in the nature of the case to make it especially proper to be tried by a jury. With all respect for that mode of trial, I think that many patent cases can be disposed of by a Judge much more satisfactorily than by a jury; and I should be exceedingly disinclined to interfere with the discretion of a Judge as to the mode in which a particular case can be most advantageously tried in his Court.

Solicitors: Messrs. *Harrison, Beal, & Harrison;* Mr. *W. W. Wynne.*

L. C.
1867
Nov. 9, 11;
Dec. 3.

HENSMAN *v.* FRYER.

Charge of Legacy—Residuary Devise specific—Wills Act, s. 24—Pecuniary Legatee—Marshalling—Contribution.

Held, upon the construction of a will, that a legacy was not charged on the residuary real estate.

Where the meaning of a will is doubtful, the Court may resort to evidence of the state of the testator's property, but where the words are plain no such extrinsic aid can be resorted to.

Decree of *Kindersley*, V.C., affirmed.

A residuary devise of real estate remains specific notwithstanding the 24th section of the *Wills Act* which makes the will speak as if it had been executed immediately before the death of the testator.

Where the personal estate is insufficient for the payment of debts and legacies, pecuniary legatees and the residuary devisee contribute rateably to the payment of the debts which the general personal estate is insufficient to satisfy.

Order of *Kindersley*, V.C., reversed.

THIS was a suit by a pecuniary legatee for the administration of the estate of *William Curtis*, who died in 1857, having by his will, made in 1851, devised the residue of his real estate to the Defendant, and having given a legacy of £2000 to the Plaintiff. The will is set out fully in the report of the case in the Court below (1).

The suit came on to be heard before Vice-Chancellor *Kindersley* in 1864, when he decided on the construction of the will that there was no charge, express or implied, of the legacy on the residuary real estate, and directed accounts accordingly.

The Chief Clerk made a certificate, from which it appeared that the debts of the testator at the time of his death amounted to £12,968, and that his personal estate amounted to about £5000. At the date of the certificate all the real estate directed to be sold for the payment of debts had been sold, and the executors had received on account thereof, and on account of the personal estate, £9444, and had paid debts to the amount of £8632; and the balance in their hands, with the outstanding personal estate, amounted to £1410. Including interest and other debts not yet proved, it was stated at the bar that the debts still unpaid would

(1) Law Rep. 2 Eq. 627.

amount to about £7670, leaving upwards of £6200 charged on the residuary real estate after the personalty and the real estate directed to be sold for the payment of debts were exhausted.

The suit came on for further consideration upon the certificate, and the Vice-Chancellor *Kindersley* then decided that by the operation of the *Wills Act* a residuary devise of real estate was no longer specific, and that therefore the pecuniary legatee was entitled to marshal as against the residuary devisee, and ordered the accounts to be taken accordingly. The decision on this question is reported (1).

The residuary devisee appealed against this order, and the pecuniary legatee appealed against the original decree in the suit.

Mr. *Glasse*, Q.C., for the residuary devisee :—

As to the first point, whether the legacy is charged by the will: the testator has given some legacies clearly charged on the real estate, which affords a strong inference that he did not mean to charge this legacy.

As to the second point, the rules as to marshalling are clear: *Roper* on Legacies (2): *Aldrich* v. *Cooper* (3). Before the *Wills Act* a pecuniary legatee had no right to marshal: *Mirehouse* v. *Scaife* (4); and that Act has made no difference: *Emuss* v. *Smith* (5). If it is true that a residuary devise of land is no longer specific, the decision of the Vice-Chancellor is correct, but we deny that proposition, as to which there has been a conflict of decisions. If that is so, the indirect effect of the *Wills Act* has been to overrule a long series of cases, which the Legislature can never have intended.

Mr. *Bristowe* (with Mr. *Glasse*) :—

The object of marshalling was to fulfil the testator's intention of benefiting the legatee, and as no intention of benefiting the heir could be discovered, the assets were marshalled as against the descended real estate. Here the testator intended to benefit both, and why is the legatee to be preferred? At the utmost it is a case of contribution. It is making new law to say that a pecuniary legatee shall be treated as if the testator had charged the legacy

(1) Law Rep. 2 Eq. 627. 12 Jur. N.S. 881. (3) 8 Ves. 382, 397.
(2) Vol. ii. p. 1. (4) 2 My. & Cr. 695.
(5) 2 De G. & Sm. 722.

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HENSMAN v. FRYER.

on the residuary real estate. The only object of the Legislature was to clear away questions as to the time of execution and as to lapse, not to make such a serious alteration as this. In *Eddels* v. *Johnson* (1), *Pearmain* v. *Twiss* (2), and *Clark* v. *Clark* (3), it has been decided that a residuary devise of real estate is still specific. The contrary in *Dady* v. *Hartridge* (4); *Rotheram* v. *Rotheram* (5); *Bethell* v. *Green* (6); *Rodhouse* v. *Mold* (7). But even if for some purposes residuary devises may be considered as no longer specific, it need not be so as to marshalling. The law is well explained in *Story*, Eq. (8), and is illustrated in *Biederman* v. *Seymour* (9), and *Tipping* v. *Tipping* (10).

Mr. *Greene*, Q.C., and Mr. *Shebbeare*, for the legatee:—

The testator clearly meant the legatee to have her legacy, and it cannot be provided except out of the residuary devised estate: *Webb* v. *Webb* (11). The Court cannot strike this legacy out of the will: *Bootle* v. *Blundell* (12). If the legacy is not expressly charged, it is charged by implication: *Ion* v. *Ashton* (13), for when the testator meant a legacy to be paid out of personalty only he said so, as he did with respect to the £50 legacy. As to marshalling, the application of assets is changed in several points by the *Wills Act*, and why not in this? Here the testator has given the measure of his bounty to the legatee, none to the devisee, who only takes what is left: *Page* v. *Leapingwell* (14). The question is fully discussed in *Jarman* on Wills (15).

[As to charges on real estate, *Lord Lilford* v. *Powys-Keck* (16), *Cogswell* v. *Armstrong* (17), *Rickard* v. *Barrett* (18), *Harris* v. *Watkins* (19), were cited.]

Mr. *Woodhouse*, for the trustees of the will, cited *Tombs* v. *Roch* (20).

(1) 1 Giff. 22.
(2) 2 Ibid. 130.
(3) 34 L. J. (Ch.) 477.
(4) 1 Dr. & Sm. 236.
(5) 26 Beav. 465.
(6) 34 Ibid. 302.
(7) 35 L. J. (Ch.) 67.
(8) § 565.
(9) 3 Beav. 368.
(10) 1 P. Wms. 729.
(11) Barn. Ch. 86.
(12) 1 Mer. 193.
(13) 28 Beav. 379.
(14) 18 Ves. 463.
(15) 3rd Ed. vol. ii. p. 588, n.
(16) Law Rep. 1 Eq. 347.
(17) 2 K. & J. 227.
(18) 3 Ibid. 289.
(19) Kay, 438.
(20) 2 Coll. 490.

Mr. *Bristowe*, in reply in the first appeal.

Mr. *Shebbeare*, in reply on the second appeal, as to the first point cited *Conron* v. *Conron* (1).

Dec. 3. LORD CHELMSFORD, L.C., after stating the will and the facts, continued:—

In support of the Plaintiff's appeal it was contended that the legacy of £2000 to the testator's granddaughter was either expressly or impliedly made a charge upon the residuary real estate devised to the grandson; that the question was one of intention, and that the testator clearly intended his granddaughter to have her legacy; and, having given away all his personal estate, he must have known that it would not be paid unless she could have recourse to the real estate. That, although the words "charged in manner hereinafter mentioned" appeared to refer solely to the annuity of £120 given to the testator's wife, yet they were capable of application to a further implied as well as to the express charge. That the case of *Webb* v. *Webb* (2) shewed that an express charge did not exclude another charge by implication, and that the amount of the testator's personal estate being wholly insufficient for the payment of his debts, it must necessarily be inferred that, intending a benefit to his granddaughter, he meant that her legacy should be paid out of the only fund available for the purpose.

There can be no doubt that, according to *Webb* v. *Webb*, a testator may use express words of charging in one part of a will, and may create a charge by implication in another part of it; but where, in a will, an express charge of a particular debt or legacy is laid upon land, it is a strong indication that the land is not intended to bear any other charge of a like nature. This exclusion of an intention, however, will give way to a necessary implication to the contrary; but, to use the words quoted by Lord *Eldon* in *Bootle* v. *Blundell* (3), the intention of the testator "must be collected from the words, not from circumstances out of the will; and upon general principles

(1) 7 H. L. C. 168. (2) Barn. Ch. 86.
(3) 19 Ves. 521.

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and established rules, not by a liberal power of conjecture upon the supposition of what a man would do in the like circumstances; that the Court cannot go into the inquiry, whether the personal estate is sufficient for the payment of all the debts, as that would establish a general rule that, where the personal estate is insufficient, the intention must be taken to be to charge the land." I do not feel myself at liberty to regard the insufficiency of the personal estate to pay the testator's debts as a ground for implying an intention that the £2000 legacy should be a charge on the real estate. Where the meaning of a will is doubtful, the Court may assist its construction by evidence of the state of the testator's property at the time when it was made; but where the words are plain, no such extrinsic aid can be resorted to, to give them a different meaning. In this case, the language of the will is too clear to require or to permit any foreign means of interpretation. The words "charged in the manner hereinafter mentioned," followed by a particular charge, are capable of only one construction; and it would be doing violence to the plain meaning of such words to construe them as if they were to be read "in manner hereinafter expressly or impliedly mentioned." I think that in this respect the Vice-Chancellor's decree was quite correct, and that the Plaintiff's Petition of appeal must be dismissed.

Upon the question raised by the Defendant's appeal, one cannot help remarking that the practical effect of the part of the order to which it is directed is inconsistent with the decree which has just been considered. The Vice-Chancellor rightly decided that the legacy of £2000 was not a charge on the residuary real estate, but by his declaration as to marshalling he has virtually made it such a charge. His Honour declared that the residuary estate devised to the Defendant, *John L. Curtis*, ought to be applied in payment of the testator's debts in aid of the legacy, and that the Plaintiff, *Rebecca L. Hensman*, was entitled to be recouped out of the said residuary real estate the amount due in respect of the legacy, thus making the residuary estate which he held to have been not intended to be charged, bear the whole burthen and charge of the Plaintiff's legacy.

The question to be determined upon the appeal of the Defendants is one of importance and difficulty. It is admitted that if the case

had arisen before the late *Wills Act* the legatee would not have been entitled to marshal the assets against the residuary devisee, because the residuary devise would only have passed the specific estate of which the testator was seised at the date of his will. But it is said that the *Wills Act* has produced an entire change in the nature of a residuary devise of land, and by enacting that every will shall be construed, with reference to real estate (as well as personal), to speak and take effect as if it had been executed immediately before the death of the testator, has taken away the specific character of a residuary devise, and brought it within the operation of the equitable doctrine with respect to the marshalling of assets. It certainly could not have been in the contemplation of the Legislature that by making a will extend to after-acquired property, they were placing a residuary devise of real estate on an entirely new footing as to the administration of a particular branch of Equity; nor is it easy to understand why the Act should be supposed to have impressed every residuary devise with a new character, although the testator may not have become possessed of any real estates after the making of his will, merely by enacting that after-acquired estates shall pass by such residuary devise. Suppose the will expressly declared that no real estate subsequently acquired by the testator was intended to pass, the residuary devise would, I presume, be as specific as before the Act; and yet, according to the argument, although the testator had no other real estate at the time of his death than he had when his will was made, by the mere force of the *Wills Act* that which otherwise would have been definite and specific, is rendered as general and indeterminate as if it were the bequest of a residue of personal property.

Lord *Cottenham*, in *Mirehouse* v. *Scaife* (1), in describing the difference between a gift of personal and of real estate, said: "When a testator gives the residue of his personal estate, he knows that it will be uncertain, till his death, what will be comprised in that gift. But it is certain that the gift will operate upon part only of what he may be possessed of at his death, all debts, funeral expenses, and other charges, being to be paid out of it; and the expression necessarily imports what will remain after all charges are defrayed. On the other hand, the testator knows precisely upon

(1) 2 My. & Cr. 706.

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what real estate such a gift will operate, unless there be charges affecting the land beyond what the personal estate can satisfy." Can it then be said that a testator knows less precisely upon what real estate his devise will operate because the Act makes the will speak and take effect from immediately before his death instead of from the date of his will. In both cases the testator knows equally well what real estate he possesses, and in both the whole not previously disposed of is embraced by the residuary devise. Why, then, should the gift be regarded as specific in the one case, and not in the other? It is said that a residuary devise since the *Wills Act* must be general because at the time it is inserted in the will the testator is ignorant to what property it may eventually extend. But as at the time when, by the Act, the testator is supposed to be speaking it must be certain what real estate will be included in the devise, I do not see how any previous uncertainty in the mind of the testator between the date of the will and the time when it is to take effect can make any difference. In either case it is the essentially precise and definite nature of the subject of the devise which gives it its specific character and not the scope and extent of its operation.

I am aware that in the view I am expressing I am encountering opposite opinions of deservedly high authority; but I cannot think that the *Wills Act* has indirectly given to legatees any right of marshalling assets as against residuary devisees, which they did not previously possess.

But although I am of opinion that the legatee cannot by marshalling throw the whole of her legacy upon the residuary devised estate, yet neither do I think that she ought to lose the whole in consequence of the exhaustion of the personal estate in payment of the debts. The testator intended that the legatee should have her legacy, as well as the devisee the devised estate. But she will be entirely disappointed if the devisee is not made to bear a proportion at least of the debts which the personal estate was insufficient to satisfy. Vice-Chancellor *Knight Bruce*, in *Tombs* v. *Roch* (1), laid down an equitable principle which is applicable to the present case, namely, that "every will ought to be read as in effect embodying a declaration by the testator that the payment

(1) 2 Coll. 502.

of his debts shall be as far as possible so arranged as not to disappoint any of the gifts made by it unless the instrument discloses a different intention." And, in accordance with the decision of that very learned and able Judge in that case, I shall hold in the present case that the legatee and the residuary devisee must contribute *pro râta* to satisfy the debts of the testator which his general personal estate was insufficient to pay.

I must, therefore, reverse the order of the Vice-Chancellor, and declare that the Plaintiff, *Rebecca L. Hensman*, the legatee of the legacy of £2000, and the Defendant, *John L. Curtis*, the residuary devisee, are liable to contribute to the debts of the testator which his general personal estate is insufficient to satisfy, according to the respective values of the said legacy and of the estates devised. And there must be an inquiry what are the relative values of the legacy and of the devised estate to each other, and the legatee and the devisee must contribute to the debts of the testator which his general personal estate is insufficient to satisfy in proportion to the values of their respective interests.

MINUTES:—Declare that the legacy of £2000 bequeathed to the Plaintiff, *Rebecca Lewin Hensman*, by the will of *William Curtis*, the testator in the pleadings named, and the residuary real estate devised to the Defendant, *John Lewin Curtis*, are respectively liable to contribute to the debts of the testator which his general personal estate is insufficient to satisfy, *pro ratâ*, according to the respective values of the said legacy and the said residuary real estate at the death of the testator, &c.

Order that the following inquiries be made:—

An inquiry what is the amount of the deficiency of the testator's general personal estate, and of the money which has arisen and to arise from the sale of the real estate, by the said will directed to be sold for the payment of his debts.

An inquiry what messuages, lands, tenements, and hereditaments, of whatsoever tenure, passed by the residuary devise in the testator's will contained to the Defendant, *J. L. Curtis*.

An inquiry what were the relative values of the said legacy of £2000 and of the hereditaments which passed by the said residuary devise to each other (having regard to the annual sum or yearly rent of £120 charged on the said hereditaments by the said testator), at the death of the testator, and in what proportion the said legacy of £2000, and the said residuary real estate devised to the Defendant, *John Lewin Curtis*, ought to contribute to make good such deficiency as aforesaid, &c.

Solicitors for the Plaintiff: Messrs. *Hensman & Nicholson.*
Solicitors for the Defendants: Messrs. *Ravenscroft & Hills.*

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BROWN *v.* OAKSHOTT.

Practice—Fiat on Petition—Undertaking for Costs.

Where a Petition of rehearing is presented by way of appeal against an order made in Chambers or on motion, the fiat on the Petition will be in the usual form.

AN order was made by the Master of the Rolls in Chambers on summons for the sale of certain property; by a second order similarly made, the operation of the first order was suspended; by a third order similarly made, the first order was revived, with a direction that this order was not to be considered as a separate order. In accordance with what was stated to be the practice at the Rolls, when an appeal is intended the parties who were dissatisfied moved as a matter of form before the Master of the Rolls in Court to discharge the third order, which motion was refused.

The parties who were dissatisfied then presented a Petition of appeal, praying that the motion might be reheard, and the first and third orders discharged or varied.

The Petition was answered in the office of the Lord Chancellor's secretary with a special fiat: "His Lordship doth order that, upon the Petitioners or their solicitors subscribing this Petition thereby consenting to pay such costs as the Court may think fit to award in relation to the matter of this appeal, and upon depositing £20, &c."

The Registrar, considering that the fiat ought to be in the usual form with the words "in respect of any proceedings had since the decree dated, &c.," giving the dates, instead of "in relation to the matter of this appeal," refused to draw up the usual order to set down the Petition of appeal.

Mr. *Baggallay*, Q.C., and Mr. *Briggs*, for the Appellants, now mentioned the difficulty to his Lordship. The Appellants had presented this Petition of appeal instead of making separate motions to discharge the separate orders. There might be a great difference in the two forms of fiat as to the costs which would be

included, but it so happened that the Appellants were not affected by the question, and merely wished to have the appeal heard.

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LORD CAIRNS, L.C., after consulting Mr. *Monro*, the Registrar, said that the difficulty seemed to have been occasioned by the form of appeal which the Appellants had adopted. His Lordship thought that the fiat ought to be in the usual form (1).

Solicitors: Messrs. *Briggs & Son.*

BETTS *v.* NEILSON.
BETTS *v.* DE VITRE.

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Patent—Sufficiency of Prior Specification to be tested by Experiments—Prior Publication—Public Use—Infringement by Transit—Infringement by Workmen—Responsibility of Master—Practice—Decree for Account and Damages.

The specification of a patent may describe the process to be adopted so insufficiently as to invalidate the patent, and yet disclose enough to shew that what is claimed by a subsequent patent is not new.

Whether a specification contains a sufficient description can only be ascertained by experiment; and in making the experiment knowledge and means may be employed which have been acquired since the date of the patent.

A prior publication will not invalidate a patent, unless it has imparted information so as to enable any one working upon it to reckon with confidence on the result.

In order to establish the prior public use of a patented article so as to invalidate the patent, it is not necessary to shew that the article had been manufactured for sale.

Where the subject of a patent in *England* is made in a foreign country, and applied to the purpose for which it was made, and under these circumstances is sent to this country for transmission to another foreign country:—

Held, that this is a sufficient user of the patent in *England* to constitute an infringement.

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(1) In *Price* v. *Dewhurst* (4 My. & Cr. 284), where the subject was much discussed, it is stated that the undertaking to pay costs was first introduced about the year 1757. The Reporter, however, has been informed by Mr. *Monro* that a similar undertaking appears in *Company of Proprietors of River Dun* v. *Burden* (L. C. 24 July, 1750; Reg. Lib. A. 1749, fol. 521), and in *Montgomerie* v. *Turner* (L. C. 2 Nov. 1750; Reg. Lib. B. 1750, fol. 48), and in other early cases. The present form of order is given in Set. Decr. 1158, and appears to have been invariably used since it was settled by *Vowles* v. *Young* (9 Ves. 172).

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It is not an answer to a suit against the directors of a company for the infringement of a patent, to allege that the acts were done by workmen employed by the directors, but contrary to their orders.

The Court, under 21 & 22 Vict. c. 27, can direct an account and award damages in the same suit.

THE Plaintiff was the owner of a patent for making metallic capsules of lead and tin compressed together, which were used in covering the corks of bottles. The patent had been the subject of much litigation, and the Plaintiff had hitherto maintained the validity of his patent, as reported, *Betts* v. *Menzies* (1). He instituted these suits to restrain the infringement of his patent; the first suit being against the agents of Scotch brewers: the second against a company and its directors, who were sought to be made personally liable.

In both suits the Defendants denied the validity of the patent on the ground that a similar patent had been taken out by one *Dobbs*, in 1804. In the first suit the Defendants also denied any infringement in *England*, and in the second suit the Defendants pleaded that the infringement, if any, had been by their servants, against their orders.

The Vice-Chancellor *Wood*, after hearing much evidence on both sides, granted injunctions, and directed accounts to be taken of the profits, and damages to be awarded to the Plaintiff in both suits.

The Defendants appealed in each case. The facts in each case, and the arguments used on each side, are sufficiently stated in the judgment of the Lord Chancellor, as given below.

Mr. *G. M. Giffard*, Q.C., Mr. *Wickens*, and Mr. *T. Aston*, for the Appellants in *Betts* v. *Neilson*.

Sir *Roundell Palmer*, Q.C., Mr. *Haddan*, and Mr. *Kekewich*, for the Appellants in *Betts* v. *De Vitre*.

Mr. *Willcock*, Q.C., Mr. *Grove*, Q.C., and Mr. *Everitt* for the Plaintiff, the Respondent in both appeals.

(1) 10 H. L. C. 117; 9 Jur. (N. S.) 29.

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Feb. 8. LORD CHELMSFORD, L.C., said that he did not consider that the questions raised in the present case had been decided by the proceedings in *Betts* v. *Menzies* (1), and he thought that the Judges in that case had not sufficiently considered the terms of the Plaintiff's specification when they held that he had not confined himself within certain limits of proportion of lead and tin in the production of his new material. His Lordship then continued :—

But although the Plaintiff's patent was for an invention specifically limited and defined, both as to the material and the mode of manufacture, still if *Dobbs* many years before had, although in very general terms, given such a description of the method of combining lead and tin as was sufficient to enable a person following his directions to produce the material in a state capable of practical application to some useful purpose, he would have covered, and, therefore, have anticipated, the Plaintiff's alleged invention.

The material produced by the Plaintiff's process may have been a superior article to that which would result from following *Dobbs's* specification, it may even have been such an advance on *Dobbs's* invention as to entitle *Betts* to a patent for an improvement upon it, but unless the process which he describes, and the proportions which he specifies, are indispensable to the production of the combined metal, *Dobbs's* general description may be sufficient to deprive him of his claim to be the inventor.

Upon the question whether *Dobbs* really disclosed a method of producing a material consisting of lead and tin combined which was capable of useful application, it was admitted that his specification must be regarded in the same light as if it had been a prior publication in a book. This renders it necessary to consider the nature and extent of the information published to the world which will be sufficient to disprove the novelty of a subsequent invention. Lord *Westbury*, in the case of *Hills* v. *Evans* (2), in answer to the question which he proposes, namely, what is the nature and extent of the information acquired from an antecedently published book or specification which is necessary to disprove

(1) 10 H. L. C. 117; 9 Jur. (N. S.) 29.
(2) 8 Jur. (N. S.) 525, 529; 31 L. J. (Ch.) 457.

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the novelty of the subsequent patent, says: "There is not, I think, any other general answer that can be given to the question than this, that the information as to the alleged invention given by the prior publication must, for the purposes of practical utility, be equal to that given by the subsequent patent. . . . If specific details are necessary for the practical working and real utility of the alleged invention, they must be found substantially in the prior publication." This appears to me to require that the prior publication should contain all the minuteness of detail of a specification, so that a workman by following it might produce the thing subsequently patented. But the Court of Queen's Bench, in the case of *Betts* v. *Menzies* (1), held (and I think correctly held) that *Dobbs's* specification might insufficiently describe the process so as to make the specification bad, and yet might disclose enough to shew that what was claimed on the Plaintiff's specification was not wholly new. I entirely agree with the opinion of Mr. Justice *Williams* in the case of *Betts* v. *Menzies*, in the Exchequer Chamber (2), "that the publication of a notion that a certain useful art may be discovered, without any information or knowledge of the means of discovery, cannot preclude a subsequent first inventor of those means from taking out a patent for the entire art." But how can it be ascertained whether *Dobbs's* specification was of this speculative and conjectural character, or contained a sufficient practical description, except by the experiments of persons following strictly the instructions which it contains. Such evidence was produced, but the Vice-Chancellor disposes of it very summarily, on the ground that from 1804 to 1849 no one had ever acted on *Dobbs's* patent. Yet if *Dobbs's* specification is to be regarded as analogous to a previous publication in a book, which was conceded throughout the argument of the case, there is the greatest possible distinction between the capability of *Dobbs's* patent being acted upon and its being actually acted upon. For, as was said by Lord *Lyndhurst* in the case of the *Household Company* v. *Neilson* (3), "If the machine is published in a book, distinctly and clearly described, corresponding with the description in the specification

(1) 1 E. & E. 990; 5 Jur. (N. S.) 1164.

(2) 1 E. & E. 1020, 1038; 6 Jur. (N. S.) 1290.

(3) Webster, Pat. Ca. 718, n.

of the patent—though it has never been actually worked—is not that an answer to the patent? It is continually the practice on trials for patents to read out of printed books without reference to anything that has been done." Although the Vice-Chancellor refused to look at this evidence, yet, as the question to be determined is, whether *Dobbs's* specification did not disclose a real practical invention which was never brought into public use, I know of no other way of ascertaining the fact except by such experiments as are proved to have been made by what are called the scientific witnesses.

I am certainly disposed to look with some suspicion at such witnesses, who, more than forty years after the expiration of the patent, which never appears to have been worked, are produced by a party in a cause to prove that the invention was capable of being carried out and made practically useful. For there is not the slightest evidence that anything was ever done by *Dobbs* under his patent, and it does appear rather strange if he had been a real inventor, and had not merely conjectured the possibility of uniting lead and tin for an useful purpose, that he himself should have left no trace of his ever having even attempted to produce the patented material, and that his nephew, two years after the expiration of the patent, instead of working upon his uncle's invention, should have taken out a patent for himself for "a new mode of uniting together or plating tin upon lead."

Other observations are to be made upon the testimony of the witnesses who prove their successful working of *Dobbs's* patent. Besides the suspicion which must always attach upon evidence which is only brought into existence for the purpose of a cause, it is said that those who make the trial of working out *Dobbs's* patent at the present day are in a more favourable position than they would have been at the date of the patent in 1804, as they bring to the experiments the advantage of all their advanced knowledge on the subject. It is, of course, very difficult for the persons making these experiments not to recur to their previously-acquired information. All that is possible for them to do, is fairly and honestly to confine their attention solely to the description given in the specification, and to work exclusively upon the information which it conveys. But it is a mistake to suppose that the persons ex-

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perimenting were to throw their minds back to 1804, and disregard all that had subsequently become known in connection with the subject of the invention. Every step in advance in the same direction prior to the date of *Betts's* patent in 1849, was so much added to the prior publication. I asked the Plaintiff's counsel, in the course of their argument, whether, supposing the metal rollers were not sufficiently powerful in *Dobbs's* day to produce anything more than imperfect adhesion, and afterwards, before *Betts's* patent, more powerful and effective rollers were invented, which would completely combine the metals in the way described by *Dobbs*, that would not have been an anticipation of *Betts's* patent. To this question I received opposite answers from the counsel. But it appears to me to be clear that if at the time of *Betts's* patent *Dobbs's* invention, though imperfect at first, had become capable of being practically carried out by means known to the public, *Betts's* patent would have been invalid. However, there is no evidence in the case whether there had been any improvement in rolling machines between 1804 and 1849.

The question whether the Defendants have satisfactorily proved the sufficiency of the description of his invention given by *Dobbs* in his specification, is one entirely of fact. And it appears to me that what I have to decide is not whether by rolling the metals of lead and tin together they will be sooner or later brought to unite, but whether, keeping strictly within the limits of *Dobbs's* description, the result will in every instance be uniformly certain so far as it depends upon the process itself.

It must be borne in mind that all the experiments proved on behalf of the Defendants were made under most favourable circumstances. The persons by whom they were made were scientific and experienced men, who came to the task with the resolution of succeeding, if success were possible:—[His Lordship then described what was done by them, and continued:—] If this was the result of one of the elaborate experiments made by witnesses chosen for the purpose, it is impossible not to doubt whether *Dobbs's* invention, as disclosed by him, was of any practical utility. But when, on the part of the Plaintiff, persons equally scientific and experienced with the witnesses for the Defendants, have made experiments (of course under a similar bias in favour of the party producing

them) and have endeavoured to combine lead with tin according to the information given in the specification of *Dobbs's* patent, and have failed, that doubt is considerably strengthened.

The Defendant is bound to satisfy me that *Dobbs* had put the public in possession of a useful invention, and furnished it with the knowledge necessary to carry it into practice, if not with infallible success, at least with reasonable certainty. And although I do not go so far as to say with Mr. *Grove* that a single unsuccessful experiment will prevent a prior publication being an anticipation, yet unless such publication has imparted the mode of carrying out the invention so as to enable any one working upon the information conveyed by it to reckon with confidence on the result, it appears to me that a person coming after and shewing the means by which the end may invariably be attained, is entitled to claim the privilege of an inventor.

I am therefore of opinion that *Dobbs's* specification was not such a publication of the invention patented by the Plaintiff as to invalidate his patent.

But the Defendants say, that apart from any question of publication by *Dobbs's* patent there is a considerable body of evidence to prove a use of the invention long prior to the date of the Plaintiff's patent. In entering upon this part of the case it is necessary to consider what amounts to such public use as will invalidate a patent. In the case of *Betts* v. *Menzies*, as I have already observed, *Erle*, J., told the jury that "if the metal was made according to the Plaintiff's process and sold commercially it would be a public use." In the present case the Vice-Chancellor said:—"I cannot say, in the absence of a single thing produced to me by any person who is said to have purchased it, that the manufacture was achieved. I want somebody who was an habitual purchaser." And again: "It was a manufacture for sale if sale could be had, but a manufacture of an unsaleable article will not be an anticipation of a patent which will produce a different and a saleable and a merchantable article," by which I understand a different, because a saleable and merchantable article. I suppose His Honour by the words "unsaleable article" must have meant a worthless article. For an article which is capable of some useful application may, from circumstances, be unsaleable at a particular time, and yet if manufactured not for

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experiment, but in the way of trade, may prevent another patent having a claim to novelty. Nor in order to establish a public use is it even necessary that the patented article should have been previously manufactured for sale. Take the case of *Carpenter* v. *Smith* (1) as an example. There a lock which the Plaintiff had patented had previously been used by an individual on a gate adjoining a public road, and it was held that this constituted such a public use of the invention as to avoid the patent. *Alderson*, B., in that case said:—"'Public use' means a use in public so as to come to the knowledge of others than the inventor, as contradistinguished from the use of it by himself in his chamber," and Lord *Abinger* said, "the public use and exercise of an invention means a use and invention *in* public, not *by* the public."

If, therefore, the evidence which I am about to examine establishes the fact that lead coated with tin by mechanical pressure, and capable of useful application, has upon any occasion been manufactured openly, not by way of experiment, but in the course of business, although not a single piece of the material was actually sold, I should hold that *Betts's* patent was invalidated. [His Lordship then commented at length on the evidence and continued:—]

Under all these circumstances, the Defendants, who are bound to prove their alleged case of public user, appear to me not to have satisfied the obligation, and I must hold that their defence upon this ground entirely fails.

There being, then, no objection to the validity of the Plaintiff's patent, either on account of previous publication or prior user, the question arises whether the Defendants have been guilty of an infringement.

The Defendants rest their denial of the infringement upon two grounds. First: That the capsules which they use are made of a material differing in the proportions of the metals from those of the Plaintiff; and, secondly: That the capsules used by them are manufactured abroad, and that bottles of beer are covered with them in *Scotland*, which bottled beer is sent through *England* for exportation only, and consequently that there is no user of the Plaintiff's patented material within the limits of the patent.

(1) 9 M. & W. 300, 303.

With respect to the answer to the case of infringement, on account of the different proportions in which the lead and tin are found by an analysis to be combined in the capsules used by the Defendants, I have already expressed my opinion that the exact proportion in which the lead and tin were to be applied does not appear to have been described in the Plaintiff's specification as essential to the manufacture. And the Plaintiff having given evidence of a method of manufacturing capsules in the neighbourhood of *Nuremberg* which corresponds precisely with the Plaintiff's description of his process, and some of these capsules so manufactured being stamped with the name of the Defendants' brewery, there appears to me to be ample evidence that the Defendants have been using capsules of a similar composition and construction to those of the Plaintiff, and have thereby infringed his patent.

The other question as to the infringement requires a little more consideration. The Defendants *Neilson* and *Marshall* are the managers of the business of Messrs. *J. & R. Tennant*, who are brewers at *Glasgow*. The Defendant *Tennant* is their agent at *Liverpool*, and the Defendant *Young* their agent in *London*. Messrs. *Tennant* sell their bottled beer for exportation only, and on that account at a lower price, they always receiving the drawback on such exportation. Their course of dealing is for their agents at *Liverpool* and in *London* to receive orders for the supply of bottled beer to foreign and colonial customers, which orders are transmitted to *Glasgow* and executed by Messrs. *Tennant*. The beer is sometimes sent directly to the foreign or colonial ports, at others it is sent to the agents in *England* to be shipped to such ports. In either case the purchasers are subject to all the responsibilities and contingencies connected with the exportation, and Messrs. *Tennant* are discharged from all liability when the beer is shipped or placed upon the railway for conveyance to its destination. A small additional charge of 2*d.* per dozen is made upon the bottled beer when it is capsuled, and the agents in *England* to whom the beer is sent for exportation receive the drawback for their principals. Under these circumstances it is insisted by the Defendants that there is no infringement of the patents in *England;* that the sale of the capsuled bottled beer takes place in *Scotland;* that it is merely *in itinere* in *England*,

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and that in its resting-place with English agents there is no active use of the capsules which can constitute an infringement. And they distinguish this case from *Caldwell* v. *Vanvlissengen* (1), in which they say the screw-propeller was actually used by the owners of the vessel for the purpose of trade. A variety of cases were suggested in argument, to shew to what extravagant consequences a decision against the Defendants would lead. It was asked whether, if the beer was sent by sea and arrived at an English port, and was there transhipped for exportation without being landed, there would be a user of the capsules in *England?* Or whether, if there were a patent for a particular dye, and a lady were to purchase a dress in *Paris* dyed with the patented colour, and then to wear it in this country, she would be guilty of an infringement? With respect to the case of the article being brought into an English port and remaining on board the vessels, and transhipped for exportation, if the mode of transmission adopted by the Defendants amounts to the user of the capsule in *England*, I can see no distinction on principle between the patented article being placed in a warehouse on land, and the ship in which it is brought from *Scotland* being made the warehouse until it can be put on board another vessel for exportation. As to the case of the patented dye upon a dress purchased abroad and brought into this country, there may be some difficulty in dealing with the case of the ignorant use of a patented invention under such circumstances, but I must decline to express any opinion upon extreme cases, which are merely matter for ingenious speculation, and not even likely to arise in such a manner as to call for a legal decision. It does not appear to me to be at all necessary to consider whether Messrs. *Tennant* were in possession of the capsuled bottled beer after the delivery of it at the railway or otherwise. The infringement of a patent is a tort, and all persons who are in any way acting towards it are jointly answerable. If, then, the mere presence of the capsuled bottles in *England* amounts to a user of the Plaintiff's invention, Messrs. *Tennant*, who send the beer into *England*, are parties to the infringement, whether they derive profit from this course of transmission or not. I think it sufficiently appears from the evidence that the capsules are not used

(1) 9 Hare, 415.

merely for the purpose of ornament, but that they are serviceable in protecting the beer from injury, and insuring its genuineness.

I do not appreciate the distinction which was pressed upon me in argument, between an active and a passive use of a thing, and the difference suggested on that ground between this case and that of *Caldwell* v. *Vanvlissengen* (1). The screw-propeller in the one case, though in motion during its use, was just as passive an agent as the capsules in the present case. It is the employment of the machine or the article for the purpose for which it was designed which constitutes its active use; and whether the capsules were intended for ornament, or for protection of the contents of the bottles upon which they were placed, the whole time they were in *England* they may be correctly said to be in active use for the very objects for which they were placed upon the bottles by the vendors. If the beer, after being purchased in *Glasgow*, had been sent into *England*, and had been afterwards sold here, there can be no doubt (I suppose) that this would have been an infringement, because it would have been a profitable user of the invention, and I cannot see how it can cease to be a user because *England* is not the final destination of the beer.

The Lords Justices, when this case was before them (2) upon the appeal from the Vice-Chancellor *Wood's* order granting the injunction, were of opinion that there had been a user of the invention in *England*. The doubt upon the subject which Lord Justice Knight *Bruce* was said to have entertained, appears to have been, whether the course should be to grant the injunction, or to refrain and to leave the matter to be decided in an action. His Lordship, however, made the remark that the enjoyment of the invention was not had in such a manner as to give an immediate and practicable benefit from the invention in this country. On which I must take leave to observe that the mere use of the capsule was the very benefit which was intended to be derived, and which, beginning from the moment when the capsules were placed upon the bottles, continued during the whole time they remained upon them. Lord Justice *Turner* was clear that there was a user of the capsules in *England*, but yielded to the distinction between active and passive, and considered that this use of the patented article was passive

(1) 9 Hare, 415. (2) 3 D. J. & S. 82; 11 Jur. (N. S.) 679.

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and not active. I will not repeat what I have already said on this subject, but will merely add that in my opinion there was an active use of the capsules by those who first placed them upon the bottles, and by those who had them in their possession afterwards with the power of either continuing or removing them. I therefore agree with the Vice-Chancellor *Wood*, and the Lords Justices, that the Defendants have been guilty of an infringement of the patent.

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It only remains for me to notice the objection made to the decree on the ground that it has not only directed an injunction and account, but also an inquiry as to damages, the Defendants contending that the Plaintiff is not entitled to damages as well as to an account. Before *Lord Cairns' Act*, 21 & 22 Vict. c. 27, damages could only be obtained at law, and where a Plaintiff in a case of the present description prayed for an account, but afterwards desired to proceed at law for damages, he was not allowed to do so except upon the terms of waiving his claim to an account. But by the 2nd section of the Act it was enacted that where the Court of Chancery has jurisdiction to entertain an application for an injunction against the commission or continuance of any wrongful act, it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to, or in substitution for such injunction. The object of this enactment was to empower Courts of equity to deal with the question of damages instead of having to send parties for this relief to the Courts of law. There is nothing in the Act to prohibit the Court from awarding damages as well as directing an account. And the Courts of equity having cases of this description entirely in their own hands are able to administer full relief, which, upon many occasions, would not be obtained without both an account and damages.

The account and the inquiry as to damages have each of them a different object: one is to ascertain what loss the Plaintiff has sustained, the other, what profit the Defendant has acquired by the infringement of the patent. It might be that the party infringing had sold the patented article at an underprice, so that the amount of his profit would be no measure of the Plaintiff's loss. And even in cases where there has been no such underselling the Plaintiff may have sustained damage far beyond what

the gains of the Defendant would compensate. In the case of *Hills* v. *Evans* (1) Lord *Westbury*, as appears from the decree, not only ordered an account "of the profits made by the Defendant by the making use and exercise of the Plaintiff's invention," but also "of such other compensation as is fit to be awarded to the Plaintiff in respect of such making use and exercise." It was suggested by counsel that the decree in this form was probably the result of an agreement between the parties, the Defendant preferring to have the damages assessed by this Court instead of at law. But this will not explain away the fact of the decree being both for an account and for damages, which shews that there is nothing irregular and improper in giving a Plaintiff both these means of relief.

It is so obvious to me that in many cases the account alone will not satisfy the entire equity of a Plaintiff, that there being nothing against principle, nor contrary to the enactment of the statute, in granting the double relief, I shall hold the Vice-Chancellor's decree to be right in this respect.

I will merely add that I agree with the opinion of the Master of the Rolls in the case of *Catton* v. *Wyld* (2), that damages may be awarded, though not specifically prayed for by the bill, the statute having vested a discretion in the Judge, which he may exercise when he thinks the case fitting without the prayer of the party.

The decree must be affirmed, and the appeal dismissed, with costs.

BETTS *v.* DE VITRE.

Feb. 8. LORD CHELMSFORD, L.C., said that the questions raised in this case as to the validity of the patent were precisely the same as in *Betts* v. *Neilson*, but as to the infringement two other defences had been set up: first, that the processes used by the Defendants were not any infringement of the Plaintiff's patent, as to which his Lordship thought, on the evidence, that they were; and, secondly, that any infringement which might have taken place was contrary to the express orders of the directors of the

(1) 8 Jur. (N.S.) 525, 531; 31 L. J. (Ch.) 457. (2) 32 Beav. 266.

L. C. 1868 BETTS v. DE VITRE.

company, for which, therefore, they could not be answerable, however the question might be determined as to the company. His Lordship, after commenting on the evidence as to the first point, and coming to the conclusion that the patent had been infringed, proceeded to say as to the second point:—One cannot help observing that the general orders issued to avoid infringing *Betts's* patent shew that the directors knew that they were running very near it in their ordinary operations, which rendered additional caution on their part necessary. Now, I will assume that the orders not to work in a particular manner were given, and that the disobedience to those orders was secret, although the evidence hardly warrants this conclusion. But granting all this to be the case, I should still hold that the directors would be liable. A master is responsible for all the acts of his servant which are done in the execution of his duty. If a coachman drives his master's carriage where he is ordered to go, and by negligent driving does an injury, the master is responsible; but if he takes a carriage without permission, and employs it for his own purpose, he alone is answerable for any injurious consequences which arise during his use of it. The alleged infringement of the Plaintiff's patent took place in the company's works, and in the course of the performance of the proper duties in which the workmen were engaged. Those who have the control of the working are responsible for the act of their subordinates, and it is not sufficient for them to order that the work shall be so done that no injury shall be occasioned to any third person. That, of course, must be avoided whether orders to that effect are given or not; but the directors were bound to take care that their orders were obeyed; and if there was a violation of them, whether openly or secretly, they are liable for the consequences.

The decree in this case must also be affirmed, and the appeal dismissed, with costs.

Solicitor for the Plaintiff: Mr. *F. Kent.*

Solicitors for the Defendants in *Betts* v. *Neilson:* Messrs. *Paterson, Snow, & Burney.*

Solicitors for the Defendants in *Betts* v. *De Vitre:* Messrs. *Hamber & Harrison;* Messrs. *Freshfields.*

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Jan. 23, 28; *Feb* 19; *April* 16, 17, 28.

Companies Act, 1862, s. 153—*Dispositions between Presentation of Petition and Winding-up Order—Contract for Sale of Goods—Delivery—Practice—Rehearing on fresh Evidence.*

Bonâ fide dispositions of property of a company in the ordinary course of its trade, made after the presenting of a Petition for winding up, and completed before the winding-up order, will, as of course, in the exercise of the discretion given to the Court by the *Companies Act*, s. 153, be confirmed. Where, however, such dispositions are incomplete, and rest in contract at the time of the winding-up order, the Court has no discretionary power to order the contract to be fulfilled, and the person with whom it was entered into, though he has paid his money, has only a general claim as a creditor for damages in respect of the breach of contract.

Where a customer of a trading company had *bonâ fide* ordered and paid for goods, and the company had loaded the goods on a railway to his address, and sent him the invoices, after the presenting of the Petition but before the winding-up order:—

Held, that the disposition of the property was complete before the winding-up order, and the goods ordered to be delivered to the customer.

Leave given to have an appeal reheard, and to adduce fresh documentary evidence on the rehearing.

Order of *Stuart*, V.C., affirmed.

THIS was an appeal by the official liquidator of the *Wiltshire Iron Company, Limited*, from an order of Vice-Chancellor *Stuart* directing certain iron to be delivered to the Respondent *Pearson*.

This appeal was first heard by Lord Justice *Cairns*, on which occasion the following facts were in evidence:

The *Wiltshire Iron Company* had an agent at *Birmingham* named *Wilkinson*, duly appointed under seal for the sale of their iron in that district. *Pearson* had been frequently a purchaser, through *Wilkinson*, of the company's iron. On the 5th of October, 1866, he had contracted with the company, through *Wilkinson*, for 500 tons, at 54*s*., to be paid for on delivery. On the 9th of November, 1866, the greater part of the iron under this contract being still undelivered, and the company being much in want of money, *Sarl*, a director of the company, went with *Wilkinson* to *Pearson* and urged him, on the ground of the necessity of the company to meet some payments, to take some iron at a price less than 54*s*., and to

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pay for it immediately, even before delivery. The reduction of price proposed was 2*s.* 6*d.* a ton, but it was ultimately fixed at 4*s.* a ton, and after some negotiation a contract was made, dated the 9th of November, 1866, for 200 tons of iron at 50*s.*, deliverable within thirty days as to 150 tons at *Wednesbury*, and as to 50 tons at *Swan Village*, *Pearson* giving then and there his two acceptances for £250 each, the whole price. At the same time he took from *Sarl* a written guarantee for delivery of the iron according to the contract. A collateral guarantee of this kind is, as was sworn and not denied, not unusual or uncommon in the *South Staffordshire* district on a contract for iron where payment precedes delivery, and on a former occasion, or on more than one, *Wilkinson* had himself given such a guarantee to *Pearson*.

The two acceptances given by *Pearson* were discounted by *Sarl* and *Wilkinson* at the bankers of the company, and part of the proceeds was applied to purposes of the company, but the official liquidator alleged that a large part was applied otherwise than to such purposes.

It appeared that when this contract was made *Sarl* and *Wilkinson* knew that a winding-up Petition had been presented on the 30th of October, but it did not appear, and there was nothing from which it could be inferred, that *Pearson* knew it, and he was cross-examined and not asked any question as to his knowledge.

At the time of this contract the company had in their general stock between eighteen and nineteen tons of iron of the kind mentioned in the contract. The rest had to be manufactured.

Between the 12th and 16th of November, 1866, the company, in order to execute this contract, loaded on their own trucks 148 tons 60 cwt. of iron addressed to *Pearson* at *Wednesbury*, and such trucks were moved from the works of the company on to the *Great Western Railway*, and were in the custody of the *Great Western Railway* on the 16th of November, on which day a winding-up order was made on the above-mentioned Petition. The freight for the iron was to be paid by the *Wiltshire Iron Company*.

The whole of this dealing between *Pearson* on the one hand, and *Sarl* and *Wilkinson*, as representing the company, on the other hand, was, in the opinion of the Lord Justice *Cairns*, perfectly *bonâ fide*, and in the usual course of business.

The iron being thus, at the time of the winding-up order, in the custody of the railway company, the official liquidator applied, by summons, to the Vice-Chancellor *Stuart* for delivery of it to him. On this summons *Pearson* appeared, and submitted to be bound by such orders as should thereafter be made: and thereupon the Vice-Chancellor ordered the iron to be delivered to him, without prejudice to any question as to the rights and liabilities of the official liquidator and *Pearson:* the consideration of such rights and liabilities to stand over.

Under this interim arrangement the iron was delivered to *Pearson,* and the official liquidator applied again to the Vice-Chancellor, on the 14th of January, 1867, for delivery to him of the iron. On the summons, the Vice-Chancellor made the order from which this appeal was brought. In substance, His Honour refused the application of the official liquidator, and ordered him to pay the costs of both summonses.

Mr. *Greene,* Q.C., and Mr. *Brooksbank,* for the official liquidator, in support of the appeal motion:—

The 153rd section of the Act makes the sale of this iron void: *Emmerson's Case* (1). The transaction was not complete at the time when the winding-up order was made: *Crawshay* v. *Eades* (2); and the Court has no discretion. The property in the iron was then in the company, and *Pearson* can only come in as a creditor.

Mr. *Bacon,* Q.C., and Mr. *L. Mackeson,* for *Pearson*:—

This was a *bonâ fide* transaction in the ordinary course of trade, without any element of suspicion about it, and the Court has never allowed such a transaction to be set aside under sect. 153.

[The LORD JUSTICE LORD CAIRNS:—How can the order for payment of costs be supported?]

The transaction was so manifestly fair, that the official liquidator had no reasonable ground for questioning it.

Mr. *Greene,* in reply:—

The Court can affirm a dealing which takes place between the presentation of the petition and the winding-up order, but what the

(1) Law Rep. 1 Ch. 433. (2) 1 B. & C. 181.

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Respondent asks the Court to do is not merely to affirm the contract, but to complete it after the winding-up order.

LORD CAIRNS, L.J. :—

One part of this order, that which relates to costs, can, in no view of the case, be supported, for the transaction was one upon which it was clearly the duty of the official liquidator to take the opinion of the Court. It is impossible to help feeling a bias to secure this iron to *Pearson* if possible, for I entertain no doubt that he contracted *bonâ fide* in the ordinary course of trade, and paid a fair price. I am afraid, however, that this is not enough to dispose of the case, but that the real question is, whether at the time of the winding-up order this iron was, apart from the effect of the winding-up proceedings, the property of the company or of *Pearson*. If it was the property of *Pearson*, the Court has, under sect. 153, a discretion to say that the transaction by which it became his shall not be avoided; but if the matter at the time of the winding-up order rested only in contract, and the iron remained the property of the company, I am afraid that the Act is imperative, and that the iron must be applied as part of the property of the company, leaving *Pearson* only his remedy as a general creditor on a breach of contract. I will take time to consider the case.

Jan. 28. LORD CAIRNS, L.J., after stating the facts, continued :—

The whole of this dealing, between Mr. *Pearson* on the one hand, and *Sarl* and *Wilkinson*, as representing the company, on the other hand, was, in my opinion, as I stated at the end of the argument, perfectly *bonâ fide*, and in the usual course of business, and if it passed beyond contract, and resulted in the transfer to *Pearson* of specific property before the order for winding up, the Court, in my opinion, would not disturb it.

The 153rd section no doubt provides that all dispositions of the property and effects of the company made between the commencement of the winding-up (that is the presentation of the Petition) and the order for winding up, shall, unless the Court otherwise orders, be void. This is a wholesome and necessary provision, to

prevent, during the period which must elapse before a Petition can be heard, the improper alienation and dissipation of the property of a company *in extremis*. But where a company actually trading, which it is the interest of every one to preserve, and ultimately to sell, as a going concern, is made the object of a winding-up Petition, which may fail or may succeed, if it were to be supposed that transactions in the ordinary course of its current trade, *bonâ fide* entered into and completed, would be avoided, and would not, in the discretion given to the Court, be maintained, the result would be that the presentation of a Petition, groundless or well-founded, would, *ipso facto*, paralyze the trade of the company, and great injury, without any counterbalance of advantage, would be done to those interested in the assets of the company.

On the other hand, if before the winding-up order was made there was no change or disposition of property, if the iron remained the property of the company, and all between the company and *Pearson* continued in contract open and executory, then the 153rd section has no application. *Pearson* is simply in the position of any other person having a claim against the company on a broken contract, and the iron being assets of the company must, under the Act, be applied *pari passu* for the benefit of all creditors, without any discretionary power in the Court to hand it over in fulfilment of a particular engagement.

Was then this iron on the 16th of November the property of *Pearson* or of the company? In my opinion it remained the property of the company. They had, no doubt, received from *Pearson* his acceptances for £500 under the contract, but no iron was then appropriated, and only a small quantity was in existence to fulfil the contract. Iron was afterwards made and loaded and dispatched, but no delivery orders, invoices, letters of advice, or other documents, communicating to *Pearson* such appropriation and dispatch have been produced as between either the iron company or the *Great Western Railway Company* and *Pearson*, although during the argument they were asked for. The iron was on the trucks of the iron company, the carriage was to be paid by and was, by the *Great Western Railway Company*, charged to the iron company and not *Pearson*, and it was, in my opinion, open to the iron company to have countermanded the delivery

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of the iron and to have fulfilled the contract by sending other iron in its place. On well established principles of law, of which the cases of *Bryans* v. *Nix* (1) and *Wait* v. *Baker* (2) may be taken as illustrations, I am, as I think, bound to hold that this iron was at the time of the order for winding up the property of the company.

I have not had the advantage of seeing any judgment of the Vice-Chancellor on this point, and I much regret that I cannot affirm the order under appeal, for Mr. *Pearson* has *bonâ fide* paid the contract price for the iron, and a little more done before the order for winding up would have made him the owner of the iron. In my opinion, the order of the Vice-Chancellor must be discharged, and an order must be made for delivery of the iron, or its net proceeds or value if it has been sold or manufactured, to the official liquidator. I can give no costs against Mr. *Pearson*, and he must be paid, or deduct from what he has to pay, any freight he has paid to the *Great Western Railway Company*. The official liquidator will have his costs out of the estate.

Feb. 20. On this day *Pearson* applied to the Lords Justices by motion, on notice, that the appeal motion might be reheard, and that he might be at liberty on the rehearing to adduce further evidence consisting of six documents sent by post to Mr. *Pearson*, dated from the 12th to the 16th of November inclusive. Five of them were invoices from the *Wiltshire Company* to *Pearson*, signifying the consignment of the parcels of iron mentioned in them; and the sixth was a notice from the *Great Western Railway Company* to *Pearson*, dated the 16th of November, informing him of the arrival of the iron mentioned in the earliest of the above invoices, and stating that it remained at his risk and cost. No explanation was given why the documents had not been produced earlier.

Mr. *Bacon*, Q.C., and Mr. *L. Mackeson*, for the application.

Mr. *Greene*, Q.C., and Mr. *Brooksbank*, for the official liquidator.

(1) 4 M. & W. 775. (2) 2 Ex. 1.

LORD CAIRNS, L.J.:—

I should be very sorry to introduce into winding-up cases any greater degree of laxity of practice than already exists; still, some indulgence must be allowed in these cases, inasmuch as the issues are not so distinctly brought out in them as in cases brought before the Court by means of regular pleadings. An application, moreover, to admit fresh documents, the genuineness of which can be tested with certainty, stands on a very different footing from an application to admit fresh parol evidence after the pinch and pressure of the case has been sustained. The present application is to admit proof of documents which, if they exist, are undoubtedly material, and I think that justice requires the evidence to be admitted, but the applicant must of course pay the costs of the present application, and even if he should be successful on the rehearing it will remain to be considered whether he ought not to pay further costs.

SIR C. J. SELWYN, L.J., concurred.

April 16, 17. The case was now re-argued before the Lords Justices Sir *W. Page Wood* and Sir *C. J. Selwyn* on the new evidence.

Mr. *Greene*, Q.C., and Mr. *Brooksbank*, for the official liquidator:—

The documents now produced make no difference in the situation of the parties. If the actual payment of the price of the iron by *Pearson*, and the loading of the iron on the railway trucks, did not pass the possession of the iron to him, how could the notification to him that the iron had been dispatched give it him? The contract was not to deliver the iron to the railway company, but to deliver it at a distant station, and, with exception of a small part, none of the iron had reached that station at the time of the winding-up: *Crawshay* v. *Eades* (1); *M'Ewan* v. *Smith* (2).

(1) 1 B. & C. 181. (2) 2 H. L. C. 309.

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In the latter case it was laid down that a delivery order was not a bill of lading, and giving it was not equivalent to delivery.

Mr. *Bacon*, Q.C., and Mr. *L. Mackeson*, for *Pearson*:—

Everything that could be done, either by the company or *Pearson*, had been done. The transaction was, in fact, complete by the consignment of the goods, accompanied by notice to the purchaser of that consignment, and the iron dispatched was absolutely appropriated to him at that time: *Fragano* v. *Long* (1); *Atkinson* v. *Bell* (2); *Sparkes* v. *Marshall* (3).

Mr. *Greene*, in reply.

April 28. SIR C. J. SELWYN, L.J., delivered the judgment of the Court.

After reading several passages from the judgment of the Lord Chancellor (4) his Lordship continued:—

In the first of the cases referred to by the Lord Chancellor, namely, *Bryans* v. *Nix* (5), *Parke*, B., in delivering the judgment of the Court, says: "If the intention of the parties to pass the property, whether absolute or special, in certain ascertained chattels is established, and they are placed in the hands of a depositary, no matter whether such depositary be a common carrier or ship-master employed by the consignor or a third person, and the chattels are so placed on account of the person who is to have that property, and the depositary assents, it is enough; and it matters not by what documents this is effected, nor is it material whether the person who is to have the property be a factor or not—for such an agreement may be made with a factor as well as any other individual." And in *Wait* v. *Baker* (6) the same learned Judge says: "It may be admitted that if goods are ordered by a person, although they are to be selected by the vendor, and to be delivered to a common carrier to be sent to the person by whom they have been ordered, the moment the goods which have been selected in pursuance of the contract are delivered to the carrier, the carrier

(1) 4 B. & C. 219.
(2) 8 Ibid. 277.
(3) 2 Bing. N. C. 761.
(4) See *ante*.
(5) 4 M. & W. 775.
(6) 2 Ex. 1.

becomes the agent of the vendee, and such a delivery amounts to a delivery to the vendee; and if there is a binding contract between the vendor and vendee, either by note in writing, or by part payment, or subsequently by part acceptance, then there is no doubt that the property passes by such delivery to the carrier." And in the case of *Fragano* v. *Long* (1), which was referred to in the argument, *Holroyd*, J., says: "When the goods are to be delivered at a distance from the vendor, and no charge is made by him for the carriage, they become the property of the buyer as soon as they are sent off."

It remains to apply these principles to the facts of this case as they are now established in evidence, and it is material to observe that the very documents have now been produced and proved upon the absence of which the Lord Chancellor commented in the passages of his judgment which I have just read, and it now appears that before the date of the winding-up order not merely a small portion, but the whole, of the iron was in existence, and had been dispatched by the company in pursuance of the contract, and that notices specifying the particular parcels of iron so dispatched had been sent to the purchaser, and there has never been any question as to the quantity, quality, or description of the goods so dispatched. It appears, therefore, so far as the company were concerned, that before the date of the winding-up order everything had been done on their part which was necessary to complete the contract, and that if there had been no failure and no winding-up, but the contract had been completed in the ordinary course, it would have been so completed without any further action on their part than what was taken before the date of the winding-up order.

On the other hand, the purchaser who has already paid the price, has always been, not only willing, but anxious to accept the iron in accordance with the invoice and notices sent to him by the company. We think, therefore, that if the facts now established in evidence had been before the Lord Chancellor, he would have held, and that we must now hold, that Mr. *Pearson* is entitled to the iron in question, and consequently that the order originally made by the Vice-Chancellor should be affirmed; that the order of the Lord Chancellor should be discharged, and that

(1) 4 B. & C. 219.

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there should be no costs of the hearing before the Lord Chancellor, nor of the hearing before us, except that the official liquidator will have his costs of those hearings out of the estate.

Solicitors: Mr. *Pulbrook;* Messrs. *Mackeson & Goldring.*

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HALY *v.* BARRY.

1 & 2 *Vict. c.* 110, *s.* 15—*Charging Order Nisi made absolute after Administration Decree—Injunction.*

A creditor recovered judgment against his debtor and issued a *fi. fa.* Shortly afterwards the debtor died. The creditor entered a suggestion on the record, entitling him to have execution against the executrix, and obtained a charging order *nisi* upon shares belonging to the debtor. After the order *nisi* had been obtained, but on the same day, a decree was made for administration of the debtor's estate. The order *nisi* not having been made absolute, the Plaintiff in the administration suit applied for an injunction to restrain further proceedings by the judgment creditor:—

Held (affirming the decision of *Malins*, V.C.), that an injunction ought not to be granted.

A charging order, when made absolute, operates from the making of the order *nisi.*

Warburton v. *Hill* (1) explained.

THIS was an appeal by the Plaintiff from a decision of Vice-Chancellor *Malins,* refusing an injunction.

On the 10th of November, 1866, the *Eastern Bengal Jute Manufacturing Company, Limited,* commenced an action against *G. R. Barry,* and on the 29th of November, 1866, recovered judgment against him for £2108. On the 1st of December a writ of *fi. fa.* was issued and immediately lodged with the sheriff, who seized certain chattels which had belonged to *Barry. Haly,* who was a creditor of *Barry,* claimed them as having been sold to him. On the 7th of December an interpleader order was made, but was never tried, as the company, being advised that they could not resist *Haly's* claim, gave them up. On the 28th of January, 1867, the company issued a summons in bankruptcy against *Barry,* but on the 31st of that month he died.

(1) Kay, 470.

On the 28th of January, 1868, *Barry's* widow proved his will, of which she was the executrix; and on the 1st of February, 1868, *Haly*, as a creditor, filed a bill for administration of the estate. On the 6th an order was made in the action to enter a suggestion on the record of the death of *Barry*, and of the appointment of his wife as his executrix. This suggestion was on the following day entered on the record, to the effect that the company were entitled to have execution of the judgment against Mrs. *Barry* as executrix. On the same day the attorney of the company applied for an order to charge 1,600 shares belonging to *Barry* in the *Upper Assam Tea Company, Limited.* This order was on the following morning (8th February, 1868) given out dated as of that day. The material part of it was as follows:—

"I do order that unless cause be shewn before me or before such other Judge as shall be in attendance at my Chambers in Rolls Garden, within one month from the date hereof, all interest which the Defendant herein, or *Mary T. Barry*, his sole executrix, has in 1,600 shares now standing in the books of the *Upper Assam Tea Company, Limited*, in the name of the said *G. R. Barry*, be charged with the sum of £2,108, being the amount of a certain judgment recovered herein on the 29th of November, 1866, by the above-named Plaintiff against the above-named Defendant."

An hour or two after this order had been given out, the usual decree for administration was pronounced in the suit of *Haly* v. *Barry.*

The Plaintiff on the same day gave notice of the decree to the *Jute Company*, and afterwards moved to restrain the company from making any application to the Court of Common Pleas, or to any Judge, or taking any other proceeding for making the judgment a charge on the shares, and from taking any other step to enforce the judgment. This motion having been refused by Vice Chancellor *Malins*, was now renewed by way of appeal before the Lords Justices. The charging order *nisi* had not been made absolute.

Mr. *Ince*, and Mr. *J. D. Bell*, for the appeal motion:—

The principle of the cases is, that after a decree for administration the Court will stop the proceedings of any creditor who has

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not got so far as actual execution: *Clarke* v. *Earl of Ormonde* (1); *Drewry* v. *Thacker* (2). A charging order absolute is in the nature of an execution, but till then the judgment creditor has substantially nothing but an injunction preventing the company from dealing with the shares it is sought to charge: 1 & 2 Vict. c. 110, ss. 14, 15.

[The LORD JUSTICE SELWYN:—Is it not the order *nisi* that creates the charge, though it requires to be made absolute before it can have full effect?]

We submit not. It is only an order to shew cause. But even if the order absolute does relate back to the order *nisi* the Court will not allow it to be made after decree. *Warburton* v. *Hill* (3), and *Bristed* v. *Wilkins* (4) are against any relation back. The Vice-Chancellor relied much on *Prole* v. *Soady* (5) as to the retrospective effect of a divorce, but here there has not been any order absolute. It was urged that where a creditor has obtained a judgment the Court will not interfere, and *Vincent* v. *Godson* (6) was referred to. But such a case is inapplicable, for there a judgment had been obtained which the executor must have answered *de bonis propriis*, and equity cannot interfere where the judgment operates not merely against the testator's assets: *Vernon* v. *Thellusson* (7); *Williams* on Executors (8). Obtaining the rule *nisi* is the same thing as issuing a writ of execution. Such a writ does not bind the property till it is delivered to the sheriff: *Lucas* v. *Nockells* (9), and the property in the goods is not changed till the writ is executed. The shares are in no way bound till notice of the order *nisi* is given to the company. *Churchill* v. *Bank of England* (10) shews the principles applicable.

Mr. *Langworthy*, for the executrix.

Mr. *Marten*, and Mr. *Watkin Williams*, for the *Jute Company*:—Our having obtained an entry of a suggestion on the roll is,

(1) Jac. 108, 123.
(2) 3 Sw. 529, 544.
(3) Kay, 470.
(4) 3 Hare, 235.
(5) Law Rep. 3 Ch. 220.
(6) 3 De G. & Sm. 717.
(7) 1 Ph. 466.
(8) 6th Ed. p. 1772.
(9) 10 Bing. 157, 182.
(10) 11 M. & W. 323.

under the *Common Law Procedure Act*, 1852, 15 & 16 Vict. c. 76, ss. 128—134, the same thing as obtaining judgment against the executrix. We are, therefore, in the same position as if we had sued the executrix and recovered judgment against her. In these circumstances we cannot be restrained: *Williams* on Executors (1), where *Vincent* v. *Godson* (2) is observed upon: *Fowler* v. *Roberts* (3); *Marriage* v. *Skiggs* (4); *Lee* v. *Park* (5); *Ranken* v. *Harwood* (6). The charging order takes effect from the time of the order *nisi*. The point did not arise in *Warburton* v. *Hill* (7), and the observations there made do not bear the sense which the Appellants attribute to them. The sections of the Act are plain—only one order is spoken of, which is at first an order *nisi*, and afterwards becomes an order absolute. *Prole* v. *Soady* (8) is in point as to very similar expressions in the *Divorce Act*. In *Vernon* v. *Thellusson* (9) no judgment had been obtained at the time of the decree. *Bristed* v. *Wilkins* (10) merely decides that the charge could not be actively enforced for a year. *Lucas* v. *Nockells* (11) has no bearing, the analogy being false. We are in the position of a judgment creditor who has delivered the writ to the sheriff.

Mr. *Ince*, in reply.

SIR W. PAGE WOOD, L.J.:—

This case, which has been fully and ably argued, is, in some degree, novel in its circumstances, but appears to me to be governed by the principles laid down in other cases. The question is, whether a creditor of the testator, who has recovered judgment at law against the executrix, and obtained a charging order *nisi*, is to be stopped from proceeding because before the order *nisi* has been made absolute he has been served with notice of a decree for administration of the testator's estate made after the obtaining that order. The appeal raises the question, what is the effect of a charging order *nisi*. The *Common Law Procedure Act*,

(1) 6th Ed. p. 1778.
(2) 3 De G. & Sm. 717.
(3) 2 Giff. 226.
(4) 4 De G. & J. 4.
(5) 1 Keen, 714.
(6) 5 Hare, 215.
(7) Kay, 470.
(8) Law Rep. 3 Ch. 220.
(9) 1 Ph. 466.
(10) 3 Hare, 235.
(11) 10 Bing. 157.

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1852, has provided a cheap and speedy way of reviving a judgment against executors in simple cases, the executors having the power of putting in a defence, and insisting that the case is one which ought only to be disposed of on *scire facias*, and it is beyond dispute that if the suggestion is entered on the record its effect is the same as that of a judgment on *scire facias* against the executor. The important question is, whether the Vice-Chancellor's decision was wrong, on the ground that as the creditor had not fully placed himself in possession of the property, the Court will consider that it is not too late to lay hold of it and bring it into the common stock for the benefit of all the creditors. Observe the creditor's position. He had sued out a writ, and done all he could do under a *fi. fa.* Then the stat. 1 & 2 Vict. c. 110, comes in to help him as to property not liable to be taken in execution:—[His Lordship here read the 14th and 15th sections.] It is obvious that throughout these sections one order only is spoken of, which is at first to be an order *nisi*, and is afterwards to be made absolute. Ought then a creditor to be interfered with who has pursued his remedies with such diligence. He has obtained a charging order, subject only to this, that cause may be shewn against making it absolute. I think that, consistently with the scope and spirit of the Act, we must hold that it is liable to be defeated only by something prior to it, shewing that it ought not to have been made, and not by anything subsequent to it. The case is very similar in principle to those in which a creditor has by his diligence obtained a personal order against the executor, and this Court has refused to interfere. Here the creditor has done all he could, and has nothing more to do, the onus lies on the other side to shew that the charging order ought not to have been made. I do not think that such a case can be treated as one in which the creditor's title is incomplete. We cannot decide this case in favour of the Appellant, on the ground that the property is not in the creditor's hands till the order is made absolute, unless we are prepared to go much further, for the property is not in the creditor's hands when the order has been made absolute, he has only a charge, the benefit of which must be obtained by further proceedings. The case of *Warburton* v. *Hill* (1) might, if the authorities

(1) Kay, 470.

referred to in *Scott* v. *Lord Hastings* (1) had been before me, have been rested on a higher ground than the one I took—namely, on the ground that a charging order against the debtor could not affect property which he had previously assigned. In the course of my judgment I said, "the date to be looked to is not that of obtaining the order *nisi*, but, subject to the operation of the 15th section as to intermediate charges, the real charge is acquired when the charging order is made absolute." I there used expressions which were not necessary to the decision, and which I am inclined to think erroneous. The statute directs the Judge to make an order *nisi*. If sufficient cause is shewn against it, it falls, but if not, it remains in force, and in the meantime it is operative, taking the fund out of the control of the debtor, and the only question remaining is, whether any sufficient cause can be shewn against making it absolute. I do not think that a subsequent decree for administration is a sufficient cause, *Clarke* v. *Lord Ormonde* (2) goes no such length as that, and it seems to me that the cases where a judgment has been obtained against an executor and the Court has refused to interfere have much more analogy to the present. The appeal must be dismissed.

SIR C. J. SELWYN, L.J. :—

The observation in *Warburton* v. *Hill* (3) which has been relied on, may be considered as explained by *Scott* v. *Lord Hastings*. The question turns upon this, whether the charging order is to be considered as one or two. It has been urged that there are two orders, and that the first goes for nothing unless followed by the other. The language of the Act appears to me quite opposed to this view, it speaks of one order which is at first an order *nisi*, and is afterwards made absolute. I agree that the appeal must be dismissed.

Solicitors: Mr. *G. H. Barton*; Messrs. *Thomas & Hollams*.

(1) 4 K. & J. 633. (2) Jac. 108.
(3) Kay, 470.

L. JJ.
1868
March 12.

In re CHINA STEAMSHIP AND LABUAN COAL COMPANY.

CAPPER'S CASE.

Winding-up—Contributory—Infant Transferee of Shares.

In June, 1865, *S.* having bought in the market shares belonging to *C.*, gave the name of *A.* as the transferee, and *C.* accordingly transferred them to *A.*, who was registered as owner. *A.* was a clerk of *S.*, and was an infant. In November, 1865, *C.* received a letter from the solicitors to the company, informing him that *A.* was an infant, and applying to him for payment of a call. *C.* having found upon inquiry that his share certificates had been cancelled and new certificates issued to *A.*, took no further notice of the matter, and no further step was taken on either side till January, 1867, when the application for the call was renewed, after a resolution for winding up the company had been passed:—

Held (affirming the decision of the Master of the Rolls), that *C.* must be on the list of contributories.

THIS was an appeal by Mr. *Capper* from an order of the Master of the Rolls refusing an application by him to remove his name from the list of contributories of the *China Steamship and Labuan Coal Company, Limited,* and substitute that of *Paris Simonides* in its place.

In February, 1865, *Simonides* instructed a broker to purchase for him shares in the company. The broker accordingly agreed with jobbers for the purchase of forty-four shares for the settlement in June. *Capper* was the holder of thirty shares in the company, and sold them in the market in June. They were appropriated to the purchase made by *Simonides,* who paid the market value. He named his clerk, *Richard Amery,* as the transferee. A transfer was executed by *Capper* to *Amery* of these thirty shares, and *Amery* was entered on the register in June, 1865.

It turned out that *Amery* was an infant, and in November, 1865, *Capper* received a letter from the solicitors of the company informing him of that fact, and applying to him for payment of £150 then due for calls on the shares. *Capper,* as he stated in his affidavit, then called on the solicitors, and found that his share certificates had been cancelled, and fresh certificates issued in the

name of *Amery*. He appeared thereupon to have done nothing further, and to have heard nothing further from the company till January, 1867, when he received a letter from the solicitors of the company asking for payment of the £150, and of a further sum of £60 in respect of a subsequent call. A resolution to wind up the company had been passed in December, 1866. In February, 1867, he received a notice from the liquidators that he was included in the list of contributories as a holder of thirty shares. He thereupon applied to have his name removed. The application was adjourned into Court, and refused with costs by the Master of the Rolls.

Mr. *Cotton*, Q.C., and Mr. *B. B. Rogers*, for the Appellant, contended that the case was distinguishable from *Mann's Case* (1),

(1) L. J. R. 1867. Aug. 1.

In re JOINT STOCK DISCOUNT COMPANY. MANN'S CASE.

IN May, 1865, 200 shares in the above-named company were, by the direction of *Parkinson*, a stockbroker of *Halifax*, to whom they belonged, transferred to and registered in the name of *Mann*, to secure an advance to *Parkinson*.

Parkinson repaid the advance in August, 1865; and by his direction the shares were transferred by *Mann* to one *Simms*, a nominee of *Parkinson*, and a clerk of his *London* agent. The 8th clause of the company's articles of association provided that the instrument of transfer of any share in the company should be executed both by the transferor and the transferee, and the transferor should be deemed to remain the proprietor of such share until the name of the transferee was entered in the register book in respect thereof. The 9th clause contained a form of transfer, and the 10th clause provided that the company might decline to register any transfer of shares made by any member who was indebted to the company, or in cases where the directors considered the transferee to be an irresponsible person, or that the transfer was made for purposes not conducive to the interests of the company.

The deed of transfer was duly executed by *Simms*, the transferee, as well as by *Mann*, the transferor, and the transfer was accepted by the company, and duly registered in their books. *Simms*, however, was then an infant of the age of eighteen, but this fact was not known either by *Mann* or the company. *Simms* afterwards transferred 180 of these shares to other persons, and when the company was ordered to be wound up, in March, 1866, the remaining twenty shares were still standing in his name. The official liquidator placed *Simms* on the list of contributories in respect of these shares; but *Simms* having proved his infancy at the time of the transfer to him, the Master of the Rolls, on a summons taken out by the liquidator, and adjourned into Court, ordered that the register of shareholders should be amended by striking out the name of *Simms*, and placing that of *Mann* thereon, and that *Mann's* name should be placed on the list of contributories in respect of the twenty shares.

From this order *Mann* now appealed.

It appeared that *Mann* had no notice

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CAPPER'S CASE.

inasmuch as there the company was in no default, and the real purchaser of the shares was not known, whereas here the company

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of any claim upon him until the 15th of February, 1867, and that *Parkinson* had become bankrupt and absconded.

Mr. *Cotton*, Q.C., and Mr. *W. F. Robinson*, for the Appellant:—

It was the duty of the directors of this company to ascertain that the proposed transferee was a proper and competent person. They accepted *Simms* as transferee, and registered the transfer to him; they are, therefore, now estopped from raising an objection which they ought to have made before they passed the transfer. *Mann* knew nothing of the infancy of *Simms*, had he done so, the transfer might have been held fraudulent, and *Mann* still a contributory: *Reid's Case* (24 Beav. 318). A minor may be a shareholder, and even vote, under the 79th section of the Act, 8 & 9 Vict. c. 16; and a conveyance to an infant is not void, but only voidable upon his coming of age. It has been, moreover, held that an infant can bind himself, and that his acceptance amounts to a statement that he is of age: *Stikeman* v. *Dawson* (1 De G. & Sm. 90; 11 Jur. 214). As the articles of association require the confirmation and ratification by the company of every transfer, the company, in fact, become parties to a transfer. They have acted on this transfer, and liabilities have been incurred by them after *Mann's* name had ceased to be on the register.

Locock Webb (*Jessel*, Q.C., with him), for the official liquidator, was not called upon.

SIR JOHN ROLT, L.J.:—

In this case the infant *Simms* was rightly removed from the register of shareholders, not by his election on attaining his majority, but by an order of the Court, on the ground that the transfer to him, made during his minority, was a mere nullity. Then it would follow, at first sight, that the transfer by *Mann* being a nullity, *Mann* still remained a shareholder. It is, however, contended that there is a duty thrown upon the directors to inquire whether a proposed transferee is a proper and competent person to be a transferee. Not merely that they had a power to reject an improper person, but that it was their duty to do so, and that they neglected this duty. Moreover, that the company had carried on business, and incurred liabilities, after *Mann* had ceased to be on the register of shareholders, and that the company are consequently estopped from saying that this transfer was a nullity.

I think that this argument cannot be sustained; and the answer to the following question shews that this is so. Was there any greater or prior duty cast upon the company of inquiring whether *Mann's* transferee was a proper person, than upon *Mann*, the transferor himself, of so doing? Both *Mann* and the company took it as a matter of course that the transferee was a proper person. The nomination by *Parkinson* of *Simms* as the transferee amounted to a representation that *Simms* was a proper person; *Mann* accepts that representation, passes it on to the company, and they act on the assumption that *Simms* was a proper person. Surely, the first duty of ascertaining that his transferee was a proper person was cast upon *Mann* himself. Therefore, I think that *Mann* still remained a shareholder, and that this appeal must be dismissed with costs.

8 Eq 658

were in default in having allowed the shares to remain in the name of *Amery* for a year and a half. [They referred to the *Companies Act*, 1862, sects. 74, 38, 23; *Sichell's Case* (1); *Oakes* v. *Turquand* (2); *Ward and Henry's Case* (3).]

[The LORD JUSTICE SELWYN referred to *Reid's Case* (4).]

Mr. *Roxburgh*, Q.C., and Mr. *Kekewich*, for the official liquidators, were not called on.

SIR W. PAGE WOOD, L.J.:—

Capper, being a registered shareholder in this company, sells his shares to *Simonides*, who inserts in the deed of transfer the name of *Amery*, an infant, as transferee, and *Amery* is registered as holder of the shares. It was the interest of *Capper*, in parting with his shares, to see that he was handing them over to a person who could be effectually placed on the register. Now, according to *Mann's Case*, a transfer of shares to an infant is invalid. Difficulties might, indeed, arise as to the effect of such a transfer, for it would seem that the infant ought to have an option whether he will repudiate or ratify the transfer. But in the present case no difficulty of that kind arises, for no dividend has been received, an order has been made for winding up the company, and the infant is not yet of age. *Capper* was informed, in November, 1865, that he was held liable as holder of these shares, and he was applied to for a call. He makes inquiry, he finds that *Amery* has been entered on the register as holder, and new certificates issued to him, and he does no more. He thinks it the most prudent course not to stir. The company do not sue him, but their application gave him fair notice that they held him liable. I cannot see any such laches on their part as can preclude them from saying that he is bound by that notice. Having received that notice, and done nothing, he must take the consequences. I am of opinion that the decision of the Master of the Rolls is right, and that the appeal ought to be dismissed.

(1) Law Rep. 3 Ch. 119.
(2) Ibid. 2 H. L. 325.
(3) Law Rep. 2 Ch. 431.
(4) 24 Beav. 318.

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SIR C. J. SELWYN, L.J.:—

In the case of a company not in course of winding up circumstances like the present might give rise to questions of some difficulty. Where, however, a winding-up order has intervened, the principle laid down in *Reid's Case* (1), following *Litchfield's Case* (2), at once disposes of the matter. *Mann's Case* goes further, and treats the transfer to the infant as a nullity; and the circumstances of the present case are still more unfavourable to the validity of the transfer. After the notice which he received in 1865, I do not think that it is competent to the Appellant to raise the question of laches against the company.

Solicitors: Messrs. *Tatham, Curling, & Walls;* Messrs. *Mackenzie & Trinder.*

L. JJ. 1868 *March* 19.

In re CILFODEN BENEFIT BUILDING SOCIETY.

Companies Act, 1862, *s.* 85—*Provisional Liquidator.*

A provisional liquidator will not in general be appointed before the hearing of a winding-up Petition not presented by the company, unless the Court is satisfied that the Petition is unopposed.

A PETITION for winding up the *Cilfoden Benefit Building Society* was presented on the 18th of March, 1868, by some contributories and creditors, and was supported by the usual short affidavit that the statements were true. On the 19th an application was made *ex parte* by the Petitioners to the Master of the Rolls for the appointment of a provisional liquidator. The Master of the Rolls declined to make the order, stating that he did not in general think it proper to appoint a provisional liquidator before hearing the Petition, unless the Petition was presented by the company itself, or was shewn to be unopposed.

(1) 24 Beav. 318. (2) 3 De G. & Sm. 141.

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Mr. *Osborne Morgan* now renewed the application before the Lords Justices.

Their Lordships considered that the Master of the Rolls had laid down a proper rule, and declined to make the order.

Solicitor: Mr. *E. Byrne.*

L. JJ.
1868
March 14.

Ex parte CARNE. *In re* WHITFORD.

Bankruptcy—Double Proof—Surety.

W., the treasurer of a union, lodged the union moneys to his account as treasurer at a bank in which he was a partner. The partners assigned their property to trustees to be administered as in bankruptcy. The guardians of the union called on *W.*'s sureties to pay the balance due from him, and they paid it. The sureties then received a dividend on a proof made in *W.*'s name against the joint estate. After this they claimed to prove against *W.*'s separate estate:—

Held (reversing the decision of the Commissioner), that the claim must be rejected, without prejudice to any application to expunge the joint proof, and substitute a proof against the separate estate.

THIS was an appeal by the trustees of a creditors' deed from a decision of the Commissioner of the *Exeter* District Court, holding that the sureties in a bond given to the guardians of the *St. Columb Union* were entitled to prove under the deed against the separate estate of *Henry Whitford* for £701 14*s.*

Henry Whitford was one of the partners in the firm of *Hawkey, Whitford, & Co.*, bankers, of *St. Columb.* This firm stopped payment in June, 1866, and on the 7th of August in the same year the partners executed a deed assigning all their property to trustees to be applied for the benefit of their joint and separate creditors in like manner as if the debtors had been at the date of the deed duly adjudged bankrupts. The deed contained a release, reserving remedies against sureties.

Henry Whitford was the treasurer of the *St. Columb Union.* Upon his appointment in 1863 he, and *Charles Hawke* and *John Tredwen* as his sureties, gave to the guardians a joint and several

L. JJ. 1868 *Ex parte* CARNE. *In re* WHITFORD.

bond in the penal sum of £1000, conditioned for his faithful performance of his duties as treasurer, and for the payment, when required, of the balance due from him.

H. Whitford, as treasurer, kept an account with the bank, which was distinguished as being an account kept by him as such treasurer. When the bank stopped payment the balance to the credit of that account was £935 12*s.* The guardians called on the sureties to pay this sum, and on the 12th of August, 1866, they paid it. A proof was made in the name of *Whitford* against the joint estate of the firm, and on the 29th of January, 1867, a dividend amounting to £233 18*s.* was received by the sureties.

After this the sureties applied to the trustees of the deed, and claimed to prove against the separate estate of *Henry Whitford* for £701 14*s.*, the balance of the £935 12*s.* after deducting the dividend received from the joint estate. The trustees declined to admit the proof, except under the direction of the District Court of Bankruptcy. On application being accordingly made to the Court the Commissioner decided in favour of the proof, and the trustees appealed.

Mr. *De Gex*, Q.C., and Mr. *Horton Smith*, for the Appellants:—

We contend, first, that this claim of the sureties, which was not a debt at the time of the execution of the creditors' deed, cannot be proved at all. If there had been an actual bankruptcy instead of a trust deed, the payment made by the sureties after the bankruptcy could only have been proved under the 173rd section of the Act of 1849, which does not, we submit, apply to this deed; for, in the first place, a creditor entitled to prove must be one who would have to be reckoned in calculating the majority of the creditors required to make the deed binding on non-assenting creditors. He therefore must have been a creditor having an ascertained debt at the time of its execution: *Ex parte Mendel* (1): and persons who have no voice as to the validity of the deed are not bound by it, nor entitled to the benefit of it. Again, the deed reserves the remedies of the creditors against sureties. The result of this is that the remedies of the sureties against the principal debtors are left untouched. The sureties therefore are not bound

(1) 1 D. J. & S. 330–336.

by the deed: *Kearsley* v. *Cole* (1); *Mare* v. *Underhill* (2): and as their claim is not released they cannot be entitled to a dividend. The cases of *Ex parte Wilmot* (3) and *Wood* v. *De Mattos* (4) are against the right of proof under a deed like this, though there would be a right of proof in bankruptcy. But suppose the case to stand on the same footing as if this were a bankruptcy, the creditors have proved, and there can be no further proof. The right of a surety is, under sect. 173 of the Act of 1849, to prove in the place of the creditor, or to have the benefit of the creditor's proof; but what has been allowed here is double proof, which is not admissible: *Ex parte Bevan* (5); *Goldsmid* v. *Cazenove* (6).

[The LORD JUSTICE WOOD:—Suppose the creditor proves against the joint estate, and receives a dividend, and then receives the balance from the surety, has the surety no right of proof against the separate estate?]

We submit not: *Ex parte Barnwall* (7). Suppose he had paid the whole debt at first, he could then have proved against the joint estate or against the separate estate, but not against both. Why is he to be in a better position because, instead of paying the whole debt, he only pays the balance. The principle is that he stands, in respect of proof, in the creditor's shoes.

Mr. *Roxburgh*, Q.C., and Mr. *Haynes*, for the sureties:—

This is not a question of double proof. There may be a right to have the former proof expunged, but that question does not arise now. Suppose the joint estate able to pay 5*s.* in the pound, and the separate estate 15*s.*, are we to be bound by the election of the guardians, and lose the difference? In the cases referred to the deeds were of a nature quite different from this. Here the administration is to be as in bankruptcy. The proof which has been made is for a debt due from the bank. What we seek to prove is a debt due from *Whitford*. The two claims are essentially distinct, and the rule against double proof is not to be stretched: *Ex parte Thornton* (8).

(1) 16 M. & W. 128.
(2) 4 B. & S. 566.
(3) Law Rep. 2 Ch. 795.
(4) Ibid. 1 Ex. 91. 12 Jur. N.S. 70
(5) 10 Ves. 107.
(6) 7 H. L. C. 785. 5 Jur. N.S. 1230
(7) 6 D. M. & G. 795, 801.
(8) 3 De G. & J. 454. 5 Jur. N.S. 212

L. JJ. 1868 *Ex parte* CARNE. *In re* WHITFORD.

SIR W. PAGE WOOD, L.J.:—

I am of opinion that the second proof cannot be admitted. The Respondents were sureties for *Whitford*, who held a responsible office. He deposited the moneys for which he was accountable to a separate ear-marked account at the bank in which he was a partner. The account thus being ear-marked, the guardians had a claim both against *Whitford* and against the bank. A deed having been executed by the bankers under which their property was to be administered as in bankruptcy, the guardians being obliged to make their election, elected to prove against the joint estate. Before any dividend had been received the sureties paid the whole sum, and have received the dividend from the joint estate. The question then is, can they go on and prove against the separate estate? Assuming the first question argued—whether there is a right of proof at all under a trust deed in respect of this claim—to be decided in favour of the Respondents, the 173rd section of the Act of 1849 governs the right of proof. It was urged for the Respondents that it is unfair that they should be fettered in their election, that the creditor should have proved against the less beneficial estate, and they be bound by it. If that be so, I can only answer that the statute says so, but whether there may not be a remedy is a question we do not mean to prejudge. The sureties, who have no contract with the bankers, have no right, except the right given them by the 173rd section, of standing in the place of the creditors, who were entitled to prove against the joint estate or the separate estate, but not against both. There being a proof against the joint estate, the order of the Commissioner must be discharged, without prejudice to any application to expunge the joint proof, and allow a fresh proof against the separate estate.

SIR C. J. SELWYN, L.J., concurred.

Solicitors: Messrs. *Uptons, Johnson, & Upton;* Messrs. *Hooke & Street.*

HALLOWS *v.* FERNIE.

L. C.
1868
Feb. 10, 11;
March 2.

Shareholder—Misrepresentation—Prospectus—Change of Directors—Misjoinder.

The directors of a company, which was intended to own and trade with steamships, issued a prospectus stating, amongst other things, that the company would commence operations with six screw steamships of a certain description, and referring to the articles of association. The Plaintiff signed and addressed to the directors the printed form of application annexed to the prospectus, asking for fifty shares, which were allotted to him. The company had no steamships at the time when the prospectus was issued, but afterwards obtained some, not of the description mentioned in the prospectus; and before the shares were allotted to the Plaintiff, one of the directors named in the prospectus had retired, and another was appointed in his place.

The Plaintiff filed a bill on behalf of himself and all the other shareholders, except the directors who were made Defendants, seeking to be relieved from his shares on the ground of misrepresentation in the prospectus:—

Held, that such a suit could not be maintained by the Plaintiff on behalf of the other shareholders, but that his suit was not, therefore, to be dismissed, as he had merely made a misjoinder of Plaintiffs:

Held, that the change of directors before the allotment did not render the allotment invalid:

Held, that the statement as to the six ships was merely ambiguous, and that the Plaintiff might have ascertained that it was not literally true by reference to the articles of association:

The prospectus named three persons as directors who had consented to act, but never took any shares:—

Held, that this was not a misrepresentation:

Held, that, under the circumstances, the Plaintiff could not be relieved from his shares.

Decree of *Wood*, V.C., affirmed.

IN the spring of the year 1864 the Defendant, *Edmund Thompson*, and eight of the other Defendants, issued a prospectus of a company called the *British and South American Steam Navigation Company, Limited;* capital £1,000,000, in shares of £20 each. The prospectus stated that the directors were Lord *Alan S. Churchill, R. Heatley, G. Holt,* and the eight above-mentioned Defendants; that the company had been formed to establish a line of steam communication between *England, Brazil,* the *River Plate,* &c.; that the company would commence operations with six screw steamships of 2200 tons and 300-horse power each (having capacity for 2000 tons of cargo, &c.), leaving *Liverpool* once a month, &c.;

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that the vessels were guaranteed to steam ten knots, and being full rigged as clipper-sailing ships, were calculated to perform the voyage regularly from *Falmouth* to *Rio* in twenty-five days, &c.; that the articles of association might be seen at the offices of the company; and the prospectus concluded with the usual form of application for shares.

The memorandum and articles of association were registered on the 24th of March. The memorandum stated the objects of the company to be, amongst other things, the building, purchasing, chartering, and hiring of ships or vessels, and carrying goods and passengers by sea or land; and by the articles of association it was provided (amongst other things) that any branch of business undertaken might be suffered by the directors to be in abeyance: that the directors should be at liberty to commence the business of the company as soon as they should think fit, notwithstanding the whole of the capital should not have been taken; and provision was made for the removal or retirement of any person as director, but all acts done by such person as a director were to be binding on him, and on the company, as if such person had been duly qualified, and if such acts were done *bonâ fide* were to be as binding on all persons whomsoever as if such person had been duly qualified.

The Plaintiff, on the 25th of April, signed and sent a form of application for fifty shares, addressed "To the directors," &c. At the end of April, 1864, Lord *Alan S. Churchill* retired, and on the 16th of May the Defendant *De Laski* was appointed a director in his stead. On the 17th of May fifty shares were allotted to the Plaintiff, and he was registered a shareholder in respect of them. Only a portion of the shares in the company were allotted, but the company commenced operations, and purchased three steamers (they having none at the time when the prospectus was issued, and these steamers not being like those mentioned in the prospectus).

In September, 1864, the Plaintiff demanded to be released from his shares, on the ground that the company had not obtained a certain subsidy from the Chilian government. In April, 1865, a call of £3 a share was made, and the Plaintiff then filed the bill in this suit, on behalf of himself and all other the original members of the company, except the Defendants, against *Fernie*, *Thompson*, the

present directors, the company, and others, seeking to be relieved from his shares, and praying that the Defendants might be restrained from enforcing the call. By this bill he alleged, and by his evidence he attempted to prove, that he had applied for his shares on the faith of the truth of the statements contained in the prospectus, and in the belief that the persons therein named as directors had consented to act; that Lord *Alan S. Churchill*, *Heatley*, and *Holt* had never acted as, or consented to be, or been directors, or held any shares; that there was a fraudulent bargain between the company and *Fernie;* that the directors, by the prospectus, had induced the Plaintiff and other shareholders to believe that the company was ready to commence business in the manner mentioned in the prospectus, but the Plaintiff had lately discovered they had not secured any ships either of the size or power mentioned in the prospectus, and that such contract as existed for the purchase of such ships had to be given up because a sufficient number of shares had not been taken up; that the Plaintiff and the other shareholders in the beginning of the year 1865 became for the first time aware of the general arrangements of the directors, and that the ships did not fulfil the statements contained in the prospectus, and were not properly fitted for the trade of the company. The further material facts of the case, and which of the allegations the Plaintiff had succeeded in proving, will be found from the judgment of the Lord Chancellor given below.

The cause was heard before the Vice-Chancellor *Wood*, who dismissed the bill as against *Fernie*, and those Defendants who were charged with fraud in relation to *Fernie's* contract, on the ground that no fraud had been shewn; and also dismissed the bill against the directors and the company, on the ground that the Plaintiff was not entitled to be relieved from his shares; as reported (1).

The Plaintiff appealed against the latter portion of the decree.

Mr. *W. M. James*, Q.C., Mr. *Little*, Q.C., and Mr. *W. F. Robinson*, for the Appellants:—

We complain of two misrepresentations; first, as to who were the directors; and next as to the six steamships which were said in the prospectus to be in existence, but were not. We applied on

(1) Law Rep. 3 Eq. 520.

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the faith that Lord *Alan Churchill* was a director, and that the company had the ships, and we are entitled to be relieved: *Central Railway Company of Venezuela* v. *Kisch* (1). Moreover, there was never a properly constituted board of directors.

At the close of the arguments on behalf of the Plaintiff, the Lord Chancellor said that he should not call upon the Respondents as to the effect of the retirement of Lord *Alan Churchill*, or as to the constitution of the board of directors.

Sir *Roundell Palmer*, Q.C., Mr. *Locock Webb*, and Mr. *F. C. J. Millar*, for the Defendants, contended that the words in the prospectus did not amount to a statement that the company had actually bought the ships, but only that they meant to do so. The ships were not mentioned in the articles of association, which only spoke in the future tense.

Mr. *Kay*, Q.C., and Mr. *Bardswell*, Mr. *Druce*, Q.C., and Mr. *Aikin*, for other parties.

Mr. *W. M. James*, in reply as to the statement that Lord *Alan Churchill*, *Heatley*, and *Holt* were directors, cited *Blake's Case* (2); and as to the effect of misrepresentation in a prospectus, *Rawlins* v. *Wickham* (3); *Central Railway Company of Venezuela* v. *Kisch* (1); *Gibson's Case* (4).

LORD CHELMSFORD, L.C., reserved his judgment, but before he was able to deliver it he delivered up the Great Seal. His Lordship, therefore, under the powers of 15 & 16 Vict. c. 80, s. 60, gave in to the Registrar of the Court of Chancery a written judgment, dated the 2nd of March, to the following effect:—

This is an appeal from part of the decree of Vice-Chancellor *Wood*, by which he dismissed the bill as to certain Defendants without costs, the other part of the decree by which the bill was dismissed as to the other Defendants with costs being unappealed from.

(1) Law Rep. 2 H. L. 99; 3 D. J. & S. 122.

(2) 34 Beav. 639.

(3) 3 De G. & J. 304, 317.

(4) 2 De G. & J. 275.

The bill was filed by the Plaintiff on behalf of himself and all other the original members of the *British and South American Steam Navigation Company* other than the Defendants, and prayed, so far as relates to the matters of the present appeal, that the Defendants, the directors of the company, might be restrained from enforcing a call against the Plaintiff and the other original shareholders. That it might be declared that the Defendants were jointly and severally liable to repay to the Plaintiff and to the other original shareholders the deposit and allotment money paid by them for shares taken by them in the company, and to indemnify them against the call then made and all future calls, they being willing to assign or transfer such shares to the Defendants, or otherwise as the Court should direct.

The Plaintiff's case being founded on alleged misrepresentations he could not properly make himself the representative of the other shareholders and file this bill on their behalf, as well as his own. For the case of each person who has been deceived by a misrepresentation is peculiar to himself, and must depend upon its own circumstances. It was held, however, in the case of *Clements* v. *Bowes* (1), where a suit was improperly brought by the Plaintiff on behalf of himself and others, that the case was within 15 & 16 Vict. c. 86, s. 49, which enacts that a suit is not to be dismissed for misjoinder of Plaintiffs, and therefore the present bill must be dealt with as if it had been filed by the Plaintiff solely on his own account.

The questions to be decided upon this appeal are :—first: whether the prospectus issued by the Defendants contains misrepresentations of material facts connected with the proposed establishment of the company; and, secondly: whether the Plaintiff has alleged and proved that he was induced by such misrepresentations to purchase the shares in respect of which he seeks by his bill to be indemnified.

The alleged misrepresentations in the prospectus relate :—

First: To the publication of the names of certain persons as directors of the proposed company, who, it is alleged, had never consented to become, and never did become, directors, or take shares in the company.

Secondly: To the statement of the preparations which had been

(1) 1 Drew. 684.

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made for the commencement of the operations of the company, as consisting of the actual possession of a certain number of screw steamships of a certain tonnage, capacity, and horse-power, which were guaranteed to steam at a certain rate of speed, and, being rigged in a particular manner, to perform the voyages to different places in *South America* in a certain specified number of days, whereas the proposed company had no such ships, nor had entered into any contract for obtaining them.

As to the alleged misrepresentation respecting the directors, I expressed an opinion in the course of the argument that this part of the Plaintiff's case had entirely failed. The allegation in the bill is, that among the names of the directors set forth in the prospectus were those of Lord *Alan Churchill, Richard Heatley,* and *G. A. H. Holt ;* that these three persons never acted, nor were directors of the company; and that they had either not consented to be directors or had withdrawn their consent. This allegation is not only not proved, but it is completely disproved, by the Defendants. It is sworn that prior to the date of the first publication of the prospectus the three persons named had severally consented to become directors, and that they afterwards attended a meeting of the directors convened by the authority of the subscribers to the memorandum of association, on the 27th of April, 1864. It appears that Lord *Alan Churchill* three days afterwards desired his name to be withdrawn from the list of directors, a circumstance upon which some stress was laid by the counsel for the Plaintiff, but with reference to the precise charge made by the Plaintiff it is wholly immaterial. The misrepresentation alleged is the insertion of Lord *Alan Churchill's* name in the prospectus as a director without his consent; the proof is, that he had consented to become a director before the issuing of the prospectus.

This case, therefore, differs entirely from *Blake's Case* (1). There the prospectus contained the names of three persons as directors, but no proof was given of their consent to accept the office, and it did not appear by the share register that any of them held a single share. The fact of the three persons holding no shares was the ground, and a fair ground, in the absence of proof of consent, for the presumption that they were not directors. If they had been

(1) 34 Beav. 639. 11 Jur. N.S. 859

shewn to have consented, as in the present case, the fact of their afterwards holding no shares would have had no bearing on the truth of the prospectus, as a prospectus is usually published before any shares are issued.

On the subject of the directors, a new point was raised for the first time upon the argument of this appeal. It was contended that there was no actual contract entered into by the Plaintiff for the purchase of his shares, because the allotment of them was not made by a properly-constituted board of directors, nor by the persons to whom, by the prospectus, the application for shares was to be made. The prospectus, as already observed, named Lord *Alan Churchill* as one of the directors, and the form of application for shares given in the prospectus is that it is to be addressed to the directors, meaning, as it was argued, the directors named in the prospectus. Before the allotment of shares Lord *Alan Churchill* had retired from the direction, and the subscribers to the memorandum of association, under the power vested in them, had on the 16th of May, 1864, appointed the same directors as were named in the prospectus, with the exception of Lord *Alan Churchill*, and in his place Mr. *De Laski* was appointed a director. By reason of this change in the direction, when the Plaintiff's shares were allotted to him on the following day, May 17th, they were allotted by a body of directors not identical with those named in the prospectus, and the Plaintiff also objects that some of the directors who made the allotment did not possess the requisite qualification, not being the holders of twenty-five shares in the company. I am quite unable to appreciate the objection founded upon a change in the direction, even if that change had been greater than that of one director for another. If the directors were regularly appointed, and had duly allotted the Plaintiff's shares, and he retained them, I do not see upon what principle he can now repudiate the contract, because (as he says) he was led to believe that it would be entered into with other parties than those by whom the allotment was made.

With respect to the objection upon the ground of want of qualification of the directors, it is answered by the legislative provision that the acts of any disqualified person acting as a director shall be as valid as if he were duly qualified.

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The only part of the Plaintiff's case which deserves consideration, is the alleged misrepresentation in the prospectus with respect to the ships. It was said on the part of the Defendants that the Plaintiff had been raking up everything that could possibly be urged against the company in order to escape from the contract, and that there was no more foundation for this remaining objection than for all the rest, on which he has failed. There is very little doubt that the Plaintiff has been very industrious in searching for grounds to impeach the integrity of the prospectus; and charges of fraud and misrepresentation proved to be unfounded are likely to create a prejudice against others of a similar description which are to be examined. But I am bound to keep my mind free from such impressions in entering upon the inquiry into the only charge which deserves examination, and which must stand or fall upon its own merits alone.

The Vice-Chancellor had great difficulty in dealing with this part of the case. He thought the representation was never justified, and was not warranted; and said it was to be regretted that, in a prospectus so truthful in a large portion of its statements, the directors should have condescended to such a misrepresentation. Upon this view of the character of the prospectus, His Honour, in dismissing the bill against the original directors, dismissed it without costs. I am unable to collect from the Vice-Chancellor's judgment the exact reason why, when he thought the directors had condescended to an unjustifiable and unwarrantable representation, he still held that the contract ought not to be avoided. In one part of his judgment His Honour put the case upon the ground that the Plaintiff, being aware of the articles of association, would discover from them that there was no direct contract as to any particular ships, and would also know the power of the directors to abandon any branch of business if they thought it beneficial to the company to proceed with a different set of operations. In another part he expressed an opinion that the misrepresentation was not as to a fact of sufficient importance to set aside the contract. He said the case was not within the observation of Sir *T. Plumer* in *Clement* v. *Tasburgh* (1), that if the contract is vitiated in part it is vitiated *in toto*. It appears to me that it is not vitiated by the single

(1) 1 Jac. & W. 112, marginal note.

circumstance of a statement bearing only on the question of the starting of the company—a thing in itself necessarily uncertain, depending upon the amounts received by subscription and the times within which they can be got in. But, with great respect to the Vice-Chancellor, if the representation was not warranted nor justified, and the Plaintiff was deceived by it, and thereby induced to take shares in the company, it was not upon a statement bearing only on the question of the time of starting the company, but upon the means actually within the power of the company to commence immediate operations.

The question then to be decided is, does the prospectus announce to the public in clear and unequivocal language that the promoters of the company actually possessed, or had contracted for the possession of, six ships of the description mentioned, so as to be ready the moment the proper amount of shares were taken, to start the company?

In speaking of the language of the prospectus, I use the words "clear and unequivocal" because it appears to me that there is a material distinction between the employment of words in a prospectus which can bear only one meaning and of those which are equivocal, and which different persons may interpret differently. In the latter case no prudent person would act upon his own construction without some inquiry. In construing a prospectus the preliminary character of the document must always be taken into consideration. Every one knows that it is intended to usher a company into existence, and not to describe its actual formation no one is surprised to find that a future sense must be given to words in the past or present tense which it contains. For instance, when we read in the prospectus in the present case the words "the company has been formed," we know that they can only mean, and can only be intended to mean, that the company is proposed to be formed for such objects, and in such a manner.

This ought always to be borne in mind when a construction is required to be put upon the language of a prospectus, and unless it distinctly refers to what is actually existing at the time, it must be taken to represent what will be the state of things when the company is completely formed.

Taking this reasonable rule as our guide, let us proceed to

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examine those passages in the prospectus to which the charge of misrepresentation applies. It is, in the first place, stated that the company will commence operations with six screw steamships. There is nothing in this form of expression to lead any one to suppose that the company were in possession of the means of commencing operations immediately. But the subsequent passage, "the vessels are guaranteed to steam ten knots, &c.," speaks plainly in the present tense; and if it stood alone, it would be very difficult for the Defendants to deny that it could only refer to some specific vessels already in their possession or power for the purposes of the company. There can be no doubt that the passage relating to the ships is very loosely and incautiously worded. I cannot imagine that it was framed in this manner for the purpose of deception; but if persons publishing a prospectus use such careless language that their statements literally read are untrue, although this literal sense is different from what they intended, this amounts to a misrepresentation, for which they may be responsible to any one who is deceived or injured by it.

I think, however, that this proposition must be confined to cases where the words used, whether taken alone or read with the context, are free from ambiguity. Because, if they may be construed in a different manner by different minds, it will be impossible to test the truth of any one man's assertion that he understood them in the sense in which they involved a misrepresentation. After the elaborate examination of this first part of the prospectus in the argument before me, its meaning cannot be regarded as so entirely free from doubt, that a person has a right, without inquiry, and acting entirely upon his own views of its proper construction, to purchase shares in the company, and then complain that he has been deceived. Because, if the words are susceptible of different meanings, he is deceived, not by the words, but by his construction of them.

But if the obvious meaning of the prospectus is to represent things as existing which had no existence, and the Plaintiff meant to complain that he read it in this sense, and was deceived by it, he cannot obtain relief without distinctly alleging and proving that the particular statement was a material inducement to his purchasing his shares. It is not sufficient in a bill praying to be

relieved from a contract for shares on the ground of its being induced by misrepresentation in a prospectus, to allege generally that the prospectus contains false statements, by which the Plaintiff was deceived and drawn into the contract, but the precise misrepresentation must be distinctly stated, and also that it formed a material inducement to the Plaintiff to take shares in the company. Now, there is no allegation in the present bill that the Plaintiff was misled by the representation in the prospectus respecting the ships. He merely states that on the faith of the truth of the statements contained in the prospectus, and in the belief that the persons named as directors had consented to act as such, the Plaintiff was induced to apply for fifty shares in the company, which shares were allotted to him. In September the Plaintiff demanded a return of the money he had subscribed, not on account of any misrepresentation as to the ships, but on the ground of the Chilian government not having granted a subsidy to the company. The Plaintiff alleges, in his bill, that he became aware of the matters upon which he claimed relief for the first time in the beginning of the year 1865. But with respect to the only subject now in question, the representation as to the company being ready to commence operations with six ships, the Plaintiff might at any time have ascertained that it was not literally true by reference to the articles of association of the company, to which he was referred, and by which he agreed to be bound in the printed form which he used upon his application for shares. If a person purchases shares in a company upon the faith of a prospectus, and is referred to any document which will shew the untruth or inaccuracy of any of its statements, and chooses not to make use of his means of knowledge, but to continue in a state of wilful ignorance of the facts, he cannot afterwards be heard to complain that he has been deceived by the alleged misstatements.

In considering the question of knowledge or means of knowledge, it is important to see whether the Plaintiff was a person likely, through inexperience, to be misled by a prospectus, or to place implicit reliance upon all that it contains. He appears to be a shipping agent and secretary to a company, and not unaccustomed to dealings in shares. He nowhere alleges in his bill that he ever before put the construction upon the prospectus which he endea-

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vours now to fasten upon it; nor does he anywhere state that it led him to the belief that the company had either procured ships, or had contracted for them, and that this belief led him to purchase his shares. And, what is a little remarkable, he does not even aver positively that the Defendants had not the actual number of ships stated in the prospectus, but only that the company had not secured any ships, either of the size or of the power mentioned in it, and had not procured a single ship—not absolutely but—capable of fulfilling the representations held out in the prospectus; and that any contract or agreement had to be given up in consequence of the small number of shares subscribed for, and the consequent inability of the company to pay for ships. And in the statement of the matters which the Plaintiff alleges he first became acquainted with in the year 1865, after mentioning the transactions of the company with the Defendant *Fernie* (upon which his bill has been dismissed with costs), he says the three vessels sold by *Fernie* and the three vessels contracted to be built did not, in fact, fulfil the statements contained in the said prospectus, and were not properly fitted for the particular trade for which the *British and South American Steam Navigation Company* had been started. From these statements it is evident that the Plaintiff's original complaint was, not that the company had not the ships in their possession, nor had contracted for them, but that the ships which they either had, or which were to be built under contract, were not of the description mentioned in the prospectus.

I am satisfied, therefore, that the attempt to read the prospectus in the present tense as representing actual possession at the time it was issued, of the specified number of ships of a particular description, is an after-thought, and that the Plaintiff's case can only be established by his giving a sense to the prospectus which he never attributed to it before.

But whatever may be the fair meaning of the prospectus, and even if the Plaintiff's construction of it is correct, he can only be entitled to succeed *secundum allegata et probata*. But he has not alleged, and he has failed to prove, that he read the prospectus in a sense which involved an untruth, that it led him into an erroneous belief of the existence of a certain state of facts, and that this belief was a material inducement to him to become a purchaser of

shares in the company. Failing these allegations and proofs, the Plaintiff has no case which entitles him to the relief prayed in his bill. The decree of Vice-Chancellor *Wood* must therefore be affirmed, and the appeal dismissed, with costs.

Solicitors for the Plaintiff: Messrs. *Torr, Janeway, & Tagart*, agents for Messrs. *Grundy & Coulson, Manchester.*

Solicitors for the Defendants: Messrs. *W. & H. P. Sharp;* Messrs. *Field, Roscoe, & Co.*, agents for Messrs. *Bateson & Co., Liverpool;* Messrs. *Westall & Roberts*, agents for Messrs. *Lace & Co., Liverpool.*

LIVERPOOL MARINE CREDIT COMPANY *v.* HUNTER.

2 PC 196

Ship Mortgage—Law of Louisiana—Comity of Nations—Duress—Equity.

A British ship, mortgaged in *England* by a British subject to British subjects, was arrested at *New Orleans* by creditors of the mortgagor, also British subjects resident in *England*, and as the Courts of *New Orleans* do not recognise such mortgages of ships, the mortgagees, in order to protect the ship from sale, gave bonds for the amounts claimed by the creditors. The mortgagees afterwards filed a bill to restrain the creditors from suing on these bonds:—

Held, that though the decisions of the Courts of *New Orleans* might be open to the reproach of injustice, yet as the creditors owed no duty to the mortgagees, and had a right to proceed against the property of their debtor wherever they found it, the bill could not be maintained.

Order of *Wood*, V.C., affirmed.

Talleyrand v. *Boulanger* (1) observed upon.

THE bill in this case stated that *Henry Lafone*, of *Liverpool*, being the owner of a ship called the *Pacific*, mortgaged her in 1865 to the Plaintiffs for £18,000, and that the mortgage was registered at *Liverpool*. That the *Liverpool Ship-building Company* were entitled to £6000, part of the £18,000. That three of the eight Defendants carried on business at *Liverpool* under the firm of *Fernie & Co.*, and that four of them carried on business at *Liverpool* under the style of *Boult & Co.*, and that all the eight Defendants carried on business at *New Orleans* under the firm of *Hunter, Askew, & Co.*

(1) 3 Ves. 447.

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The bill then stated several dealings between *Lafone* and *Fernie & Co.*, and several dealings as to a bill of exchange which had been dishonoured, and proceeded to state that in October, 1866, *Lafone* employed *Boult & Co.* as his brokers, and that they consigned the ship, with the concurrence of *Lafone*, to *Hunter, Askew, & Co.*, at *New Orleans*, upon the assurance and undertaking of both firms that *Hunter, Askew, & Co.*, who were, or claimed to be, creditors of *Lafone*, would not attempt to take any proceedings against the ship abroad, but would remit the freight to her mortgagees as an independent transaction. That *Boult & Co.* were at that time in difficulties, and in consequence thereof the *Liverpool Ship-building Company* did not approve of their continuing to act as her brokers, and changed the consignment of the ship to another firm at *New Orleans* (1). That *Boult & Co.* thereupon cancelled their instructions to *Hunter, Askew, & Co.*, and advised them to consult their solicitor, and, if they could, to arrest the ship on her arrival at *New Orleans*, for all money due to them by *Lafone*.

That *Hunter, Askew, & Co.* were agents for the *Liverpool* firms, and commenced two actions against *Lafone* in one of the Courts at *New Orleans* for the recovery of the sums alleged to be due to them on the above-mentioned dealings, and for the recovery for the use of a bank at *New Orleans* of the sum due on the above-mentioned dishonoured bill, which had been discounted by that bank. That they obtained writs of attachment, under which the ship was seized by the sheriff of *New Orleans*. That by the law of *Louisiana* transfers of chattels without delivery are not recognised, and that the title of the Plaintiffs as first mortgagees would have been disregarded by the Courts at *New Orleans*. That the only means by which the Plaintiffs could prevent the sale of the ship was by giving bonds to *Hunter, Askew, & Co.* as security for the sums to be recovered in the actions against *Lafone*. That the Plaintiffs accordingly, by their agents in *New Orleans*, gave the Defendants two bonds as such security, whereupon the ship was released. That the Defendants were proceeding with the actions against *Lafone*, and intended to take proceedings in *New Orleans* against the Plain-

(1) It did not appear how this company obtained power to change the consignee, nor did it appear whether the Plaintiffs were aware of, or assented to, the consignment of the ship to *New Orleans*.

tiffs on the bonds, for the purpose of enforcing payment from the Plaintiffs of what might be recovered against *Lafone*. That all the Defendants were British subjects, and all, except *Askew*, who was temporarily at *New Orleans*, were within the jurisdiction. And the bill charged that these proceedings were a fraud upon the Plaintiffs and on the policy of the law, and prayed that the Defendants might be restrained from proceeding at *New Orleans*, or elsewhere, against the Plaintiffs for the purpose of enforcing the bonds, and if the Defendants should so proceed, then that they might be made personally liable to the Plaintiffs for the moneys which the Plaintiffs might be so obliged to pay.

The four Defendants who formed the firm of *Boult & Co.* demurred for want of equity, and the Vice-Chancellor *Wood* allowed the demurrer as reported (1).

The Plaintiffs appealed.

Mr. *Kay*, Q.C., and Mr. *Fischer*, for the Appellants:—

No country but *Louisiana* disregards the comity of nations, and treats foreign mortgages in this manner. The Defendants knew this, and sent out the ship on purpose, knowing that they were doing a great wrong, and committing a positive fraud. If the money had actually been paid at *New Orleans*, it could be recovered at law as extorted by wrong: *Marriot* v. *Hampton* (2); *Wakefield* v. *Newbon* (3); *Somes* v. *British Empire Shipping Company* (4); *Smith* v. *Cuff* (5); *Tamvaco* v. *Simpson* (6); and surely this Court must be able to interfere before the money is paid. There is no difficulty in restraining the Defendants from suing on these bonds in the Courts in *New Orleans*: *Carron Iron Company* v. *Maclaren* (7). A man cannot avail himself of the proceedings in one country to extort money which could not be recovered in another: *Talleyrand* v. *Boulanger* (8); *Lord Cranstown* v. *Johnston* (9); *Simpson* v. *Fogo* (10); *Wright* v. *Simpson* (11).

(1) Law Rep. 4 Eq. 62.
(2) 2 Sm. L. C. 325, 4th Ed.
(3) 6 Q. B. 276.
(4) 8 H. L. C. 338; 6 Jur. N.S. 761.
(5) 6 M. & S. 160.
(6) 19 C. B. (N. S.) 453. 11 Jur. N.S. 926.
(7) 5 H. L. C. 416.
(8) 3 Ves. 447.
(9) Ibid. 170.
(10) 1 J. & H. 18; 1 H. & M. 195; 9 Jur. (N.S.) 403. 6 Jur. N.S. 949.
(11) 6 Ves. 714.

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Mr. *G. M. Giffard*, Q.C., and Mr. *W. F. Robinson*, in support of the demurrer:—

There is no doubt that money paid under duress can be recovered, and that this Court will interfere to stay proceedings in a foreign Court on a proper case, but there is nothing of the kind here. This Court has nothing to do with what the Court of *Louisiana* may think right. In *Lord Cranstown* v. *Johnston* (1) the whole thing was contrivance and fraud. The Plaintiffs knew the state of things, and yet allowed the ship to go to *New Orleans*, and voluntarily gave these bonds. If this bill can be maintained, every American creditor could recover, but no English creditor could. We cannot set aside the laws of another country because we consider them unjust. The laws of many countries do not recognise mortgages of ships, or of other chattels, without delivery of possession. There is no contract between the Plaintiffs and the Defendants in this suit: *Pennell* v. *Roy* (2). If we only recognise natural justice, what is to be said to our laws as to registration of bills of sale, or as to the seizure of a lodger's property for rent. This Court cannot sit as a Court of Appeal from that of *Louisiana*. If these bonds are held invalid, the Courts of *New Orleans* will simply refuse to release a vessel in future on such bonds.

Mr. *Kay*, in reply.

LORD CHELMSFORD, L.C., reserved his judgment, but before he was able to deliver it, he delivered up the Great Seal. His Lordship therefore, under the powers of 15 & 16 Vict. c. 80, s. 60, gave in to the Registrar of the Court of Chancery a written judgment, dated the 2nd of March, to the following effect:—

This is an appeal from a decree of Vice-Chancellor *Wood* allowing a demurrer to a bill filed by the Plaintiffs praying for an injunction to restrain the Defendants from taking any proceedings at law or in equity at *New Orleans*, or elsewhere, against the Plaintiffs or their agents for the purpose of enforcing certain bonds given by the Plaintiffs to the Defendants.

The following are the material facts admitted by the demurrer:—[His Lordship then stated the principal allegations of the bill.]

(1) 3 Ves. 170. (2) 3 D. M. & G. 126. 17 Jur 247

It was argued that the law of *Louisiana*, which refuses to recognise transfers of property in chattels without delivery of possession, was so contrary to natural justice that it was entitled to no respect in the Courts of this country; that it was inequitable for the Defendants to avail themselves of this law and institute proceedings in a State where they knew that the Plaintiffs' property in the ship would be entirely disregarded, and that the Defendants having obtained possession of her by legal process, it would have been useless for the Plaintiffs to apply to the Court at *New Orleans* to restrain the sale, as their title as mortgagees would not be admitted; that the Plaintiffs had no means of obtaining possession of their property but by intervening in the actions, and giving the bonds in question, which were therefore extorted from them by duress and ought not to be permitted to be enforced.

The law of *Louisiana* as to mortgages of ships, founded upon the rule of the civil law, that upon a sale of goods delivery is necessary to complete the transfer, was treated in the argument as being in itself contrary to natural justice. It appears to be peculiar to the State of *Louisiana*, no such application of the law having been shewn to exist in any other State or country; and it has been disapproved of by eminent American jurists.

But as a law of the State applicable to the dealings of its own citizens, whether it is the subject of positive legislation, or rests only upon the decisions of the Courts, there is no such inherent injustice in it as absolutely to disentitle it to regard when brought into question in this country. It is the application of the law to foreigners, and the refusal to recognise their title to chattels—a title which is valid and complete in their own country—unless the property is accompanied with possession, which renders, not the law itself, but the decisions of the Courts of *Louisiana* upon it, open to the reproach of injustice.

The transfer of personal property must be regulated by the law of the owner's domicile, and if valid by that law ought to be so regarded by the Courts of every other country where it is brought into question. It was therefore the application of the peculiar law of *Louisiana* to a case which, by the comity of nations, ought to have been excluded from its operation, which makes the decision

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of Vice-Chancellor *Wood* in the case of *Simpson* v. *Fogo* (1) quite correct, and to be reconciled with his judgment in the present case. The law of *Louisiana* is, in itself, unobjectionable, and it was not with that law, but with the decision of the Courts upon that law, that His Honour had to deal. When, in the case of *Simpson* v. *Fogo*, the Court at *New Orleans* refused to recognise the Plaintiff's right in the ship which he had validly acquired, and which would have been admitted in any other country, the Court may be said rather to have confiscated than to have directed a legal sale of the Plaintiff's property. This total disregard of the comity of nations justified the Vice-Chancellor, when the ship was brought to this country, though in the possession of a purchaser under the sheriff's sale in *America*, in holding that the property had not been divested by a judgment so fraught with injustice, and in decreeing the restitution of the ship to the true owner.

The present case involves no direct questions as to the Plaintiffs' property in the ship; but it rests upon the ground of its being inequitable for the Defendants to have instituted proceedings against *Lafone* in *New Orleans*, which they knew would result in the attachment of the ship to the disregard of the Plaintiffs' title as mortgagees, of which the Defendants were fully aware.

But upon what principle can it be contended that if a creditor pursues the property of his debtor to a foreign country, where he knows that the rights of a third person in that property will not be regarded, he can be considered to have acted so unjustly and inequitably towards that person as to enable him to invoke the interference of Equity to restrain the proceedings?

The Defendants owed no duty to the Plaintiffs. The undertaking of the Defendants when the ship was to be consigned to *Hunter, Askew, & Co.*, that they would remit the freight to the mortgagees, was entered into with *Lafone* and not with the Plaintiffs, and it came to an end when the consignment of the ship was changed.

The Defendants had an undoubted right to proceed against their debtor when available property of his came within the jurisdiction of the Court at *New Orleans*. It must always be borne in mind

(1) 1 J. & H. 18; 1 H. & M. 195; 9 Jur. (N. S.) 403, 6 L. 949.

that *Lafone* had not parted with the whole of his interest in the ship; he had an equity of redemption to which, at all events, his creditors were entitled; and if he were indebted to any of the citizens of the state of *Louisiana*, they, by diligence against him, might have secured the whole of his available property for the satisfaction of their debts, and the Defendants might have been deprived of the means of recovering anything. In the words of the Master of the Rolls in *Lord Cranstown* v. *Johnston* (1): "The Defendant had a right to enforce payment by all means the law of this or any other country would give him." That case was cited by the counsel for the Appellants in support of their argument, but it was an entirely different case from the present. There, a person availed himself of an Act of the Assembly of *St. Kitts*, which authorized a creditor to proceed against an absent debtor by writ of summons, and enacted that if the provost marshal or other person summoning could not find the debtor, a summons and copy of the declaration left at the last usual place of abode, or upon the freehold of the Defendant, and another nailed up at the Court-house door, should be good and effectual. The Plaintiff in the action proceeded against the Defendant, who was absent from the island, and summoned him in the manner described. He then signed judgment, sued out execution, hurried on the sale of the Defendant's property, and was the sole bidder. The Master of the Rolls decreed that the creditor upon being paid the principal and interest due to him should re-convey the estate. In the course of his judgment His Honour observed (2): "A summons left upon the freehold, as it is called, of a person who had no freehold in possession; who had no tenant upon whom this constructive notice could be served; and the creditor here knowing this avails himself of this law, which I do not mean to quarrel with; but neither that law nor any law in His Majesty's dominions could be, I hope, carried to the extent of authorizing a sale without either actual or constructive notice."

The proceedings of the Plaintiff in that case were most unconscientious towards the Defendant, but in the present case there was nothing unjust in the Defendants' actions against *Lafone*. Yet the Plaintiffs insist that the Defendants had no right to

(1) 3 Ves. 170, 180. (2) 3 Ves. p. 181.

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pursue their legitimate remedy against their debtor, because in its consequences it affected the property of the Plaintiffs. But if the Defendants' action was well founded, what right have the Plaintiffs to say, that the Defendants shall not have the full benefit of it on account of the prejudice which arises to the Plaintiffs from its collateral consequences?

The case of *Talleyrand* v. *Boulanger* (1) was cited to shew that a party has no right to avail himself of a foreign law which gives him a better remedy than he could be entitled to in the place where the cause of action arises. But that case has really no application. The facts were that Monsieur *Talleyrand*, upon the occasion of his being made Bishop of *Autun*, borrowed money from the Defendant, as principal with the *Compte de Perigord* as surety. By the law of *France* no arrest of the person could take place, either upon mesne process or in execution, under that obligation. The *Compte de Perigord* being in this country was arrested by the Defendant, and to procure his release he paid the Defendant a sum of money, and gave him two bills of exchange for part of the debt, and executed a bond for the residue payable at a stated period, the Plaintiff *Talleyrand* joining as a surety in the securities. The Plaintiff paid one of the bills of exchange, but refused to make any more payments, upon which he was arrested and held to bail by the Defendant in four actions, which Lord *Loughborough* restrained by injunction. His Lordship said: "I am not prepared to say how far this Court will finally give redress, but I will not allow the Defendant to avail himself of an advantage got by duress, which is the sole cause of the new engagement." There was, however, no duress in the case in the legal sense of that word, for although the law of *France* would not have allowed an arrest, yet the Plaintiff was entitled to avail himself of all the remedies which the law of this country afforded him for the recovery of the debt. This very point was decided between two foreigners in the case of *De la Vega* v. *Vianna* (2), where Lord *Tenterden* said: "A person suing in this country must take the law as he finds it. He cannot, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here, and he ought not, therefore, to be deprived of any superior advantage which the law of this country

(1) 3 Ves. 447. (2) 1 B. & Ad. 284, 288.

may confer;" and in the case of *Don* v. *Lippmann* (1) Lord *Brougham*, in advising the House, said: "The law on this point is well settled in this country, where this distinction is properly taken, that whatever relates to the remedy to be enforced must be determined by the *lex fori*, the law of the country to the tribunals of which the appeal is made." The proceedings of the Plaintiff in *Talleyrand* v. *Boulanger* (2) might have been harsh, but they were not contrary to law, and therefore there was no more duress in the case than there would be in the case of a person lawfully arrested giving a bail bond to the sheriff to obtain his discharge out of custody. A court of law would not, under the circumstances (as the Lord Chancellor supposed), have discharged the Defendant upon common bail. For this, the case already mentioned of *De la Vega* v *Vianna* (3) is a direct authority. I do not, therefore, see how Equity could properly interfere to restrain the actions which, however oppressive as Lord *Loughborough* thought them, arose out of remedies employed by the Plaintiff for the recovery of his debt, of which the law entitled him to avail himself.

The Plaintiff's counsel put their argument very high by likening this case to one where a ship being within the territories of a savage king, a person should influence him to give orders for its seizure and for delivery over of the possession, but such a proceeding would be merely the exercise of arbitrary authority without a form or colour of law and justice, and wholly unlike what has taken place in the present case. The actions against *Lafone* were brought in the regular course in the Courts at *New Orleans*. The Defendants had a right to commence them, nor could they have been prevented even if the Plaintiffs' title had been recognised, as it did not exhaust all the interest of *Lafone* in the ship.

It is impossible for the Plaintiffs to establish that the ship was unlawfully seized, as it was done under process in actions which the Defendants were entitled to bring. But this is the only foundation upon which the Plaintiffs' case can rest, for if a man pays money or gives securities (which is the same thing in effect) to redeem his goods from the custody of the law, that is not a case of duress, nor can he recover back his money or defend himself

(1) 5 Cl. & F. 1, 13.
(2) 3 Ves. 447.
(3) 1 B. & Ad. 284.

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from proceedings taken to enforce the securities which he has paid or given under legal compulsion. I am of opinion that the decree of Vice-Chancellor *Wood* is right, and that it ought to be affirmed, and the appeal dismissed with costs.

Solicitors for the Plaintiffs: Messrs. *Chester & Urquhart*, agents for Messrs. *Lace & Co., Liverpool.*

Solicitors for the Defendants: Messrs. *Field, Roscoe, & Co.*, agents for Messrs. *Bateson & Co., Liverpool.*

L. C. 1868 *June* 5.

LLOYD *v.* BANKS.

Notice to Trustee—Insolvency—Assignment—Priority.

The trustee of a fund saw in a newspaper the notice of a Petition to the Insolvent Debtors' Court, presented by his *cestui que trust*, and acted on the information so acquired:—

Held, under the circumstances, that a subsequent assignee of the *cestui que trust* who had given to the trustee formal notice of the assignment did not thereby acquire priority over the assignee in insolvency.

Order of the Master of the Rolls reversed.

ON the 19th of January, 1859, Mr. *T. Lloyd* presented his Petition to the Court for the Relief of Insolvent Debtors, and on the 22nd of January the usual vesting order was made. At that time he was entitled in reversion expectant on the death of his wife, *Ann C. Lloyd*, formerly *Ann C. Cheese*, to the income of certain trust funds, under his marriage settlement, of which *R. W. Banks*, a solicitor, was sole surviving trustee. *Ann C. Lloyd* died in October, 1861. In November, 1861, *T. Lloyd* mortgaged his life interest under the settlement to *Mark Shephard*, and in March following the usual notice of the mortgage was given by Mr. *Shephard* to Mr. *Banks*. No formal notice of the proceedings in insolvency was given to Mr. *Banks* until February, 1864; but he stated that he had read in a newspaper of the 16th of February, 1859, a notice that *T. Lloyd's* Petition in insolvency for discharge would come on to be heard on the 4th of March. He had also dealt with *T. Lloyd* on the footing of the insolvency being a fact, and had not paid the annuity to him. The other material statements of Mr. *Banks* will be found in the judgment of the Lord Chancellor.

A suit was instituted for the administration of the trusts of the settlement, and in the course of the proceedings the Master of the Rolls held that *Shephard* was entitled to priority over the assignee in insolvency, and made an order accordingly, as reported (1).

The assignee in insolvency appealed.

Mr. *Pearson*, Q.C., and Mr. *H. B. Miller*, for the Appellant:—

Mr. *Banks* was a solicitor, and must have understood the effect of the Petition in insolvency, and therefore had notice: *Browne* v. *Savage* (2). There is no rule that notice *aliunde* will not do: *Smith* v. *Smith* (3), which is cited with approval in *Meux* v. *Bell* (4); *Tibbits* v. *George* (5); *In re Tichener* (6). The only rule is, that the trustee must be in a position to be able to tell any one who inquires that there is an incumbrance. Mr. *Shephard* should have inquired. *Ex parte Newton* (7) is corrected by *Bartlett* v. *Bartlett* (8); *In re Brown's Trusts* (9) is not in accordance with the other cases.

Mr. *Jessel*, Q.C., and Mr. *Kingdon*, for the Respondent:—

If the question had been put to Mr. *Banks*, and he had said that he had not received notice, he would, according to the doctrine on the other side, have been liable, and yet that would be very hard upon him. *Foster* v. *Cockerell* (10) is the leading case. If one person takes the trouble to give notice, and another does not, the person who gives the notice obtains the benefit of his diligence. *In re Atkinson* (11) is a very similar case. Without notice the title is not completed: *In re Barr's Trusts* (12); *Thompson* v. *Speirs* (13). The rule has three objects: first, to enable the trustee to give information to any proposed assignee; secondly, to protect assignees; and, thirdly, to protect the trustee himself; and these objects are not attained unless the trustee has a formal notice which affects him, and which he is not liable to forget: *Sugden's* Vendors and Purchasers (14).

(1) Law Rep. 4 Eq. 222.
(2) 4 Drew. 635.
(3) 2 C. & M. 231.
(4) 1 Hare, 88.
(5) 5 Ad. & E. 107.
(6) 35 Beav. 317.
(7) 4 D. & Ch. 138.
(8) 1 De G. & J. 143.
(9) Law Rep. 5 Eq. 88.
(10) 3 Cl. & F. 456.
(11) 2 D. M. & G. 140.
(12) 4 K. & J. 219.
(13) 13 Sim. 469.
(14) 14th Ed. p. 378, 755.

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LORD CAIRNS, L.C.:—

I do not think it is the province of this Court to lay down rules which might, in the abstract, be useful and wholesome rules for the conduct of business in matters of this kind. If such abstract rules are to be laid down, they must be laid down by the Legislature of the country. All I can do is to apply those principles which have been well established as part of the principles on which the Court proceeds. Now there is no doubt, with regard to property of the kind in question here, that an equitable incumbrancer, if he has any regard for his own interests—any desire to make his position secure—will take very good care himself to give direct and distinct notice, and I will even go further and say, as Mr. *Jessel* did, to give it in writing to the trustees of the property on which he has obtained his incumbrance; and if he does not do that, he will be at very great peril, because he will have to encounter, first, the danger of the trustee being left in entire ignorance of the security, and next, if he attempts to prove knowledge of the trustee *aliunde*, the difficulty which this Court will always feel in attending to what are called casual conversations, or in attending to any kind of intimation which will put the trustee in a less favourable position as regards his mode of action than he would have been in if he had got distinct and clear notice from the incumbrancer. At the same time I am bound to say that I do not think it would be consistent with the principles upon which this Court has always proceeded, or with the authorities which have been referred to, if I were to hold that under no circumstances could a trustee, without express notice from the incumbrancer, be fixed with knowledge of an incumbrance upon the fund of which he is the trustee so as to give the incumbrancer the same benefit which he would have had if he had himself given notice to the trustee. It must depend upon the facts of the case; but I am quite prepared to say that I think the Court would expect to find that those who alleged that the trustee had knowledge of the incumbrance had made it out, not by any evidence of casual conversations, much less by any proof of what would only be constructive notice—but by proof that the mind of the trustee has in some way been brought to an intelligent apprehension of the nature of the incumbrance which has come upon the property, so that a reasonable man, or an ordinary man of business, would act

upon the information and would regulate his conduct by it in the execution of the trust. If it can be shewn that in any way the trustee has got knowledge of that kind—knowledge which would operate upon the mind of any rational man, or man of business, and make him act with reference to the knowledge he has so acquired—then I think the end is attained, and that there has been fixed upon the conscience of the trustee, and through that upon the trust fund, a security against its being parted with in any way that would be inconsistent with the incumbrance which has been created.

Now what are the facts in the present case? We have a person in the position of a sole trustee—he was not only sole trustee, but he was a solicitor, and he was not only a solicitor, but he was intimately and personally acquainted with the family into which this gentleman had married, and was aware that he had fallen into pecuniary difficulties:—[His Lordship then read several passages from Mr. *Bank's* evidence to this effect.] I will not assume, because I do not think the case requires it at all, but at the same time there is a very strong probability, that a solicitor reading an advertisement of that kind would know perfectly well that the law of this country required at that time that before an insolvent debtor could petition for his discharge the proper formalities must have been gone through, of his executing an assignment, or having a vesting order made:—[His Lordship then read several passages from Mr. *Banks'* evidence to shew that he saw and took particular notice of the advertisement.] Then he says, "I have not paid the annuity of £200 under the settlement to Mr. *Lloyd* since the death of his wife in October, 1861; that was the time from which the annuity would be payable to Mr. *Lloyd;* that annuity was payable half-yearly in December and July, and one half-year's annuity was payable to Mr. *Lloyd* in December, 1861." Now this is a very important statement, because this is exactly what we want to know—did what had come to Mr. *Banks'* knowledge impress him with the belief that he was to hold his hand with regard to the application of the trust fund? There was half a year's annuity payable to Mr. *Lloyd* in December 1861. He did not pay it. He says, "I was then sole trustee. Mr. *Lloyd's* insolvency was not the immediate cause why I did not pay him the half-year's annuity due in December,

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1861. It had so far to do with the insolvency that I would not have paid to any one who could not give me a valid receipt for it, the same reason applies to all payments of the said annuity which subsequently accrued." What more can be wanted? There was the very fund. Here is the annuity unincumbered except by means of the vesting order, and the knowledge that had come to the mind of Mr. *Banks* operated upon him so far that he held his hand and refused to pay the insolvent debtor the accruing annuity.

It appears to me that the case is conclusively proved as far as regards notice upon that evidence. The cross-examination does not in any way shake what Mr. *Banks* has said, nor is there any suggestion that Mr. *Banks* desired to state the matter otherwise than with perfect fairness. It appears to have been established beyond the possibility of any doubt or misapprehension, that Mr. *Banks* perfectly well knew of the insolvency, and acted upon that knowledge. That being so, although I agree that the assignee in insolvency runs the risk of its being otherwise, but being so, it seems to me that the assignee in insolvency has a good title: he is the first incumbrancer in date; the trustee has notice of the insolvency, and nothing more is required.

I think, with great respect to the Master of the Rolls, that the order made must be varied accordingly.

Solicitors: Mr. *Mark Shephard;* Messrs. *Walker Twyford, & Belward.*

KENT *v.* FREEHOLD LAND AND BRICK-MAKING COMPANY.

L. C.
1868
June 3.

Shareholder—Misrepresentation—Winding-up—Practice—Re-hearing—Dismissal.

A Plaintiff cannot be relieved from shares in a company upon the ground of misrepresentation in the prospectus, on a bill filed after the presentation of a Petition for winding up the company, on which an order was subsequently made.

Decree of *Wood*, V.C., reversed.

Where a decree has been made against several Defendants, the bill may be dismissed against all the Defendants on a Petition of re-hearing presented by one Defendant only.

J. C. KENT, the Plaintiff in this case, had applied for shares in the *Freehold Land and Brick-making Company, Limited;* the shares were allotted to him on the 16th of November, 1865, and the company was registered on the 24th of November. On the 20th of July, 1866, he learnt, as he stated, certain facts shewing that the representations of the prospectus on the faith of which he took shares were fraudulent, and on the 24th of July his solicitor wrote to the company demanding a return of the money he had paid. On the 25th of September a Petition for winding up the company was presented, and another on the 18th of October; on the 12th of November, 1866, a winding-up order was made upon both Petitions. On the 8th of October, 1866, the Plaintiff had filed his bill in this suit against the company and the directors, charging fraud and misrepresentation, and praying that the register of shareholders might be rectified by striking out his name, and that all the Defendants might be ordered to re-pay him what he had paid to the company. The cause was heard before the Vice-Chancellor *Wood*, who considered that the Plaintiff had established a case of fraudulent misrepresentation in the prospectus, and made a decree as prayed against all the Defendants. The case is reported (1).

The company appealed: all the other Defendants were served with the order for setting down the Petition of appeal, but they did not appear.

(1) Law Rep. 4 Eq. 588.

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Mr. *W. M. James*, Q.C., and Mr. *Cracknall*, for the Appellants, said that the decision of the Vice-Chancellor *Wood* was given before that of the House of Lords in *In re Overend, Gurney, & Co.* (*Oakes* v. *Turquand*) (1), which governed this case.

Mr. *Glasse*, Q.C., and Mr. *Locock Webb*, for the Plaintiff, said that the difference was that in this case the bill had been filed against an existing company, and before the winding-up order was made. Though under the Act the order related back to the date of the Petition, this ought not to affect the *status* of any person with regard to proceedings taken by him: *Henderson* v. *Lacon* (2). Moreover, in this case the Plaintiff's contract had been, not with the company, but with the promoters, and before registration.

LORD CAIRNS, L.C., said that he was unable to see any difference between the present case and that of *In re Overend, Gurney, & Co.* The Act provided that a winding-up order should take effect as from the date of the presentation of the Petition; and where there had been several Petitions the order must date from the earliest. Consequently here the winding-up must be taken to have commenced on the 25th of September, 1866, at which time the Plaintiff's name was still on the register. It had been urged that the contract by which he became a shareholder was a voidable contract on account of fraud. But, assuming that Mr. *Kent* had established a gross case of fraud against the company, all this only brought the case up to that of the shareholders in *Re Overend, Gurney, & Co.* His Lordship still adhered to the principle on which he had decided the case of the *Reese River Silver Mining Company, Smith's Case* (3), viz., that where a shareholder before a winding-up had commenced, filed a bill to have his name taken off the register of a company, and obtained an injunction suspending the exercise of the powers of the company against him as a shareholder, that amounted to a complete repudiation of his shares. But here the bill had not been so filed in time. As for the argument that the Plaintiff had shewn a clear intention to repudiate as early as the 24th of July, 1866, the fact that he had then

(1) Law Rep. 2 H. L. 325. (2) Law Rep. 5 Eq. 249.
(3) Law Rep. 2 Ch. 604.

written intimating his repudiation of the shares, when coupled with the fact of his delay to file his bill for two months from that time, put his case really in a worse position than it would have been in otherwise. His Lordship believed that the Vice-Chancellor *Wood*, if the judgment of the House of Lords in *In re Overend, Gurney, & Co.* had preceded his decree, would have dismissed the Plaintiff's bill; and he thought, therefore, that he was not in reality deciding in a way contrary to that learned Judge in now dismissing the bill, which must be done.

June 5. THE LORD CHANCELLOR said that the order dismissing this bill ought to be without prejudice to any claim which the Plaintiff might have against any of the Defendants except the company. The bill asked relief against the company, and incidentally asked to make the other Defendants liable for the money. He thought that this could not be done, though there might be a remedy against some of the Defendants in some other proceeding.

Mr. *Glasse* called the attention of the Lord Chancellor to the form of the decree, which dismissed the bill against all the Defendants, though the company only had appealed.

The LORD CHANCELLOR said that an appeal in Chancery was a re-hearing, and that the Court had power to deal with the whole case.

Solicitors: Mr. *T. R. Kent;* Messrs. *Stuart & Massey.*

L. JJ.
1868
April 29.

LEHMANN *v.* McARTHUR.

Lease—Covenant not to assign without License—Proviso that License not to be refused unreasonably—Specific Performance—Laches.

20 L J 663.
10 Ch D 758.
15 Ch D 103.
16 Ch D 390

A lease contained a covenant by the lessee not to assign without license; and the lessor covenanted not to refuse his license unreasonably or vexatiously.

The lessee contracted to assign his lease to the Plaintiff "subject to the landlord's approval." The lessor on being applied to for his license refused to give it, not from any personal objection to the proposed assignee, but because he wished himself to buy up the lease in order to rebuild the premises. The lessee having failed to obtain the lessor's license, surrendered the lease to the lessor for the same price for which he had agreed with the Plaintiff.

In a bill by the Plaintiff against the lessor and lessee for specific performance of the contract to assign the lease to him:—

Held, that the reference to the landlord's approval in the contract did not throw upon the lessee the duty of taking legal proceedings to oblige the lessor to give his license; and that having used all reasonable efforts to induce the lessor to consent, he was at liberty to consider the contract at an end and make his own terms with the lessor.

Whether the refusal on the part of the lessor under the circumstances was unreasonable and vexatious, *Quære*.

A continual claim without any active steps in support of it will not keep alive a right which would otherwise be barred by laches.

Decree of *Stuart*, V.C., for specific performance reversed, and bill dismissed with costs.

THIS was an appeal from a decision of Vice-Chancellor *Stuart* (1). The facts were as follows:—

By an indenture, dated in September, 1862, the Defendant *Shakerley* demised to the Defendant *McArthur* certain premises in the City of *London* for a term of twenty-one years, determinable after seven or fourteen years, at the yearly rent of £230, subject to certain covenants, and among others that the lessee would not assign the premises to any person without the previous license and consent in writing of the lessor, but which license it was expressly agreed by and between the parties "should not be withheld unreasonably or vexatiously."

In the year 1864 *McArthur* being desirous to sell his lease placed it in the hands of his agents, Messrs. *Debenham & Tewson*,

(1) Law Rep. 3 Eq. 746.

who received a proposal from the Plaintiff. On the 27th of July, 1864, *McArthur* wrote to his agents a letter, in which he refused the Plaintiff's offer, but agreed to take 1000 guineas for his interest "subject to the landlord's approval," and also subject to the existing tenancies, and he stated that his proposal to sell was not to be binding until the return of a Mr. *Guild* from *Australia*, when he should have the power to affirm or annul the proposal; and in the meantime the Plaintiff was to pay a deposit of £250 (which was afterwards reduced to £150) to be returned if the contract were annulled, less the rent of £4 a week for part of the premises which the Plaintiff was to occupy. On the 3rd of August the Plaintiff accepted the offer, and he thereupon paid the deposit and was let into possession of part of the premises. *McArthur* subsequently declined the option of annulling the contract, and the title was approved by the purchaser, and on the 5th of September, 1864, the assignment was engrossed.

On the faith of the agreement the Plaintiff entered into a treaty with two of the under-tenants to prolong their tenancies at considerably increased rents, but the treaty went off in consequence of the non-performance of the contract for sale.

Up to this time it appears to have been assumed by both parties that the landlord would give his license, but on application being made to him he absolutely refused to do so. The reason alleged for his refusal was not any objection to the responsibility or respectability of the intended assignee, but that the landlord had been buying up the interests of some others of his lessees and wished to purchase *McArthur's* also. This refusal was made known to *McArthur* on the 27th of September, 1864, and was at once communicated to the Plaintiff. *McArthur* continued however to urge *Shakerley* not to withhold his license, and even threatened him with legal proceedings to oblige him to give it, but without success, and on the 18th of November, 1864, *McArthur's* solicitors wrote to the Plaintiff's solicitor, stating their regret that the lessor positively refused to give his license, and that they must therefore consider the treaty at an end.

In the meantime *Shakerley* had offered to *McArthur* to purchase the lease of him at the same price as that which the Plaintiff had agreed to give, and the Plaintiff eventually consented to this, and

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on the 16th of December, 1864, *McArthur* signed an agreement to assign or surrender the lease to *Shakerley*.

After the refusal to grant a license some negotiations took place between the Plaintiff and *Shakerley* through their solicitors, with the view of the Plaintiff obtaining a lease of the premises from *Shakerley*, but these negotiations failed, as *Shakerley* asked terms to which the Plaintiff would not accede.

On the 9th of February, 1865, the Plaintiff had an interview with *McArthur*, and requested him again to urge *Shakerley* to grant a license, but he told the Plaintiff that he had considered the contract at an end, and on the 23rd of February he informed him that he had agreed to assign the premises to *Shakerley*. On the 3rd of April, 1865, *McArthur* executed an assignment of the lease to the Defendant *Broughton* in trust for *Shakerley*.

The Plaintiff continued in possession of some part of the premises, and in January, 1866, actions for rent were brought against him, one by the Defendant *McArthur*, and the other by *Broughton*. The bill was filed on the 12th of February, 1866, praying for the specific performance of the agreement by the Defendant *McArthur* for the residue of the term; that the Defendants *Shakerley* and *Broughton* might be decreed to concur in the assignment; for payment of damages to the Plaintiff on account of the non-performance of the agreement; and for an injunction to restrain the actions.

The Defendants *McArthur* and *Shakerley*, by their answers, admitted the solvency and respectability of the Plaintiff, and that no objection to him as a tenant existed: but *Shakerley* alleged that it was a matter of importance to him to get in the leasehold interests in the premises, with a view to re-building them.

The Vice-Chancellor being of opinion that the refusal of the lessor to give his license was unreasonable and vexatious, granted the relief prayed: the Defendants *Shakerley* and *Broughton* appealed from this decision.

Sir *Roundell Palmer*, Q.C., Mr. *Kay*, Q.C., and Mr. *Rowcliffe*, for the Appellants:—

There are two questions which arise in this case. First: what was the contract between *McArthur* and *Shakerley*. Secondly: what was the contract between *McArthur* and the Plaintiff.

With respect to the first question, the clause in the lease is clear that the lease should not be assigned without the previous consent of the lessor. If *McArthur* attempted to assign without the lessor's consent he could confer no interest on the proposed assignee, and would be liable to re-entry by the lessor. According to the Plaintiff's contention the assignment would be good until the lessor had shewn reasonable causes for objecting. But this is not the effect of the lease. It is true that the lessor is bound by his covenant not to refuse his consent unreasonably, but the lessee's remedy would be by cross action on the covenant. In the present case there was nothing unreasonable in the landlord's refusal. He wished to rebuild the premises, and as *McArthur* did not wish to occupy them himself, he could not complain if the landlord paid him the full price which he would have got from the proposed assignee. Under those circumstances, what damages could *McArthur* have recovered at law?

With respect to the contract between *McArthur* and the Plaintiff, the agreement was expressly made subject to the landlord's approval. No reference was made to the lease, or to any special clause in it. The words ought to be taken in the ordinary acceptation. *McArthur* did all in his power to obtain the landlord's approval, and he was not bound to take upon himself the expense and risk of litigation to force the landlord to consent.

We also rely upon the Plaintiff's delay in enforcing his rights. He was told that the contract was at an end in November, 1864, and the bill was not filed till February, 1866. A mere protest, although continued, is not sufficient to keep a contested right alive: *Clegg* v. *Edmondson* (1); *Southcomb* v. *Bishop of Exeter* (2); *Watson* v. *Reid* (3); *Heaphy* v. *Hill* (4).

Mr. *Dickinson*, Q.C., and Mr. *Phear*, for the Plaintiff:—

The Plaintiff became, under the contract with *McArthur*, the equitable owner of the lease, and the landlord took the assignment from *McArthur* subject to his rights. There is, therefore, no want of privity between the landlord and *McArthur*. The words in the contract, "subject to the approval of the landlord," bore manifest

(1) 8 D. M. & G. 787. (3) 1 Russ. & My. 236.
(2) 6 Hare, 213. (4) 2 S. & S. 29.

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reference to the proviso in the lease, and must be construed with reference to it. *McArthur* so understood it, for in the course of the correspondence it was called the landlord's "license," and *McArthur* threatened legal proceedings to oblige the landlord to give it. We contend that the refusal to grant the license was unreasonable. It was a fraud upon the covenant for the landlord to obtain an advantage to himself by withholding it, when there was no personal objection to the proposed assignee.

The delay of the Plaintiff in filing the bill is accounted for by the negotiations which were going on. There was not a mere assertion of a right, which distinguishes the case from *Clegg* v. *Edmondson* (1). He was treating with the landlord, but could not agree upon the terms offered.

Mr. *Osborne*, Q.C., and Mr. *Bunting*, for the Defendant *McArthur*.

Mr. *Kay*, in reply.

SIR W. PAGE WOOD, L.J.:—

The question in this case turns principally upon the construction of the agreement between the Plaintiff and *McArthur*. The agreement is contained in letters which passed between the parties, and the terms are stated in a letter of the 27th of July, 1864, from *McArthur*, which was intended to be communicated, and was communicated to the Plaintiff, in which he said that he would take 1000 guineas for his interest "subject to the landlord's approval." The main question is, what was the effect of the expression "subject to the landlord's approval?" No doubt, under any circumstances, it would be the duty of the landlord not to interpose unreasonably; and it was the duty of *McArthur* to do his best to obtain the landlord's consent. The case could not be put higher than by taking the agreement to refer to the usual proviso, that no assignment should be made without the consent of the landlord. It turns out that there was in the lease the usual covenant not to assign without the landlord's consent; but there was also a proviso that the landlord should not withhold his consent unreasonably or vexatiously. These are certainly very vague

(1) 8 D. M. & G. 787.

words, and such as would encourage great latitude of interpretation. I do not go the length of saying that the landlord would be justified in refusing his consent capriciously, or that the lessee would only be entitled to his remedy at law for breach of the covenant. Probably the Court would interfere by injunction in a proper case. But, looking at the agreement itself, I think *McArthur* was only bound to try to get the landlord's consent without going into the question whether the refusal was reasonable or unreasonable, and without taking the risk of legal proceedings to enforce his consent.

We find, accordingly, that communications took place between *McArthur* and the landlord. It would have been better if immediate communications had been made on both sides. But this was not done till a later period. Things went on as if the landlord had consented. It was taken for granted by both parties that the only question was as to the Plaintiff's responsibility and respectability. So they went on with the business without ascertaining the landlord's feelings. When, however, the landlord was communicated with, he refused at once; there was no delay on his part. He said that he had been buying up the other leases, and he was intending to buy up *McArthur's* lease. He said, in effect, "My view is, that if I give you every advantage you would obtain by the proposed assignment, you cannot complain. You do not wish to occupy the premises yourself, and I will give you all you can get from the intended assignment." Suppose the lessee had been evicted, and had brought an action against the lessor for damages, and the lessor had said, "I am prepared to give him everything he could have got, and I tendered it before he was evicted." Could he have recovered damages in the action? I do not wish to give any decided opinion, but I do not see how he could have recovered anything. But in justice to *McArthur* I must say that he was not to be called upon to litigate the matter. He did all that was in his power to press the landlord to give his consent. He says that he was tempted by his landlord's offer, but he nevertheless wrote strong letters to him, through his solicitor, endeavouring to persuade him, but the landlord would not consent, and finding that it was hopeless he then agreed to his offer. It certainly would have been better if *McArthur* had communicated the fact of his being in negotiation with the landlord immediately

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to the Plaintiff. In November, 1864, he told him that the landlord would not give his license, and that the contract was at an end; but he did not tell him that he was about himself to conclude a bargain with the landlord until the letter of the 23rd of February, 1865.

Then followed a further correspondence between the other parties, but nothing passed between the Plaintiff and *McArthur* between the 23rd of February, and the 30th of March, on which day Mr. *Chapple* (the solicitor of the Plaintiff) writes to the agents of *McArthur*, and they replied that they considered all his rights were at an end, and that the assignment to the landlord would be executed on Monday next. Surely the Plaintiff ought at once to have filed his bill.

All matters between the Plaintiff and *McArthur* ended there; but a long correspondence took place between Mr. *Chapple*, the Plaintiff's solicitor, and the agents of *Shakerley*, and the bill was not filed till February, 1866.

First, then, what are the rights of the Plaintiff against *McArthur*? I think there are none, unless *McArthur* has by dealing with the landlord precluded the Plaintiff from obtaining his just rights. But can this be said after the negotiation which took place between *McArthur* and the landlord? *McArthur* did all in his power to induce him to consent, but without avail. He informed the Plaintiff of the landlord's refusal in the month of February, and gave him a month to consider what course he would pursue in that state of circumstances. I think he was not liable to do anything more, and was not subject to blame if he then treated with the landlord for a surrender of the lease. Then as to any claim the Plaintiff may have had against the landlord, nearly a year elapsed after the assignment before he filed the bill, and I think that he cannot now raise any question as against him. The bill fails in all respects, and ought to have been dismissed with costs.

SIR C. J. SELWYN, L.J.:—

The first question relates to the construction of the letter of the 27th of July, 1864, so far as the words "subject to the landlord's approval" are concerned. It is contended that the words

must be construed to include a reference to the covenant contained in the lease, and to imply an obligation on the part of the vendor to take such proceedings as might be necessary against the landlord to try the question whether his refusal to grant the license was or not unreasonable and vexatious. If it could be shewn that *McArthur* had by collusion with the landlord, or by fraudulent or improper conduct, prevented the performance of the contract, a very different question might have arisen; but I take it to be clearly proved that *McArthur* did all he could do, and made repeated attempts to obtain the license of the landlord, and failed to obtain it by reason of the landlord's absolute refusal, which refusal was not caused by any act of *McArthur's*, but by a reason with which he had nothing to do, namely, the scheme which the landlord had in view.

Dismissing the consideration of what might have been the consequence of any such fraudulent or improper conduct, upon what grounds are we to give these words, "subject to the landlord's approval," a constructive meaning more extensive than the natural and ordinary meaning? We have been referred to *McArthur's* answer, and to several letters from the solicitors referring to the application for the license, but they amount to little more than evidence to shew that the ordinary course of endeavouring to obtain the landlord's license was, in fact, pursued, and cannot have any bearing upon the construction of the original agreement. It is, in my judgment, more consonant with the ordinary meaning of the words themselves, and quite as consistent with the probable intention of the vendor to guard himself against the trouble of a litigation with his landlord, to construe these words in the limited sense attributed to them by the Appellant, rather than to adopt the extended and referential construction contended for by the Plaintiff. And even if the matter were doubtful, we should be bound in a suit for specific performance to bear in mind the rule laid down by Lord *Redesdale* in *Harnett* v. *Yielding* (1), where he says that Courts of Equity will refuse specific performance of agreements "when, from the circumstances, it is doubtful whether the party meant to contract to the extent that he is sought to be charged." It is unnecessary for me to express my opinion upon

(1) 2 Sch. & Lef. p. 554.

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the question whether the refusal on the part of the landlord to consent to the assignment was, under the circumstances, unreasonable and vexatious; but the Plaintiff has not established this to my satisfaction.

I also think that having regard to the nature of the property which was the subject of the contract (a short term of years determinable in 1869), and to the position of the different parties interested in it, the Plaintiff has not sufficiently accounted for the delay in filing the bill. The case of *Clegg* v. *Edmondson* (1) has been much commented on by both sides, and it is true that the circumstances of that case are widely different from those of the present case; but the bearing of that case on the present depends mainly on the general principle laid down as to what has been termed continual claim. Lord Justice *Turner* there says: "What the Plaintiffs mainly relied upon was the continual claim on their part, and no doubt they have not ceased to assert their claim; but I cannot agree to a doctrine so dangerous as that the mere assertion of a claim unaccompanied by any act to give effect to it, can avail to keep alive a right which would otherwise be precluded."

If there had been a treaty or negotiation for terms in order to avoid unnecessary litigation, that would be an excuse, but in this case, although there was negotiation as to other matters, there was nothing which could properly be called a negotiation or treaty with respect to the matters in dispute, but, on the contrary, a distinct and repeated refusal to enter into any treaty or into any correspondence on the subject.

The letters relied on on the part of the Plaintiff amount at the most to nothing but that continual claim, which has already been shewn to be unimportant. On the whole, I am of opinion that the bill must be dismissed with costs. There will be no costs of the appeal.

Solicitor for the Plaintiff: Mr. *Chapple.*

Solicitors for the Defendants *Shakerley* and *Broughton*: Messrs. *Gregory, Rowcliffes, & Rawle.*

Solicitors for the Defendant *McArthur*: Messrs. *Carritt & Son.*

(1) 8 D. M. & G. p. 810.

HALTON *v.* FOSTER.

L. JJ.
1868
April 28.

Will—"Next of Kin of A.B. in Blood as if she had died unmarried," read "Nearest Relations," not Statutory Next of Kin.

A testator gave a legacy to his daughter for life, and in default of issue, in trust "for her next of kin in blood as if she had died unmarried." The daughter died without issue:—

Held (reversing the order appealed from), that the only surviving sister of the daughter was entitled to the legacy in exclusion of children of deceased brothers and sisters, for that the words "as if she had died unmarried" did not point to the mode of distribution in cases of intestacy, and that "next of kin," therefore, must be taken as meaning nearest relations, and not persons entitled as next of kin according to the statute.

THIS was an appeal by the Plaintiffs from a decree of the Court of Chancery of *Lancaster*.

John Foster, by will, dated the 24th of July, 1826, bequeathed to his trustees in trust for each of his three daughters £4000, to be settled as thereinafter directed, namely, in trust to pay the income of each daughter's legacy to her during her life for her separate use, and after their respective deaths in trust to stand possessed of the principal sum of £4000 for all and every the children of each daughter in equal shares, and in case of no children who should attain the age of twenty-one years, then in trust for such persons as each such daughter should by will appoint, and in default of appointment, "then in trust for the next of kin in blood of each daughter as if she had died unmarried; but I nevertheless authorize my said trustees and trustee for the time being in any settlement to be made in pursuance of this will to give the husband of any of my daughters who may happen to survive his wife the income of the settled property for life, if they or he shall think proper so to do."

Ellen Lloyd, one of the testator's daughters, died in 1866, a widow. She never had issue, and she did not exercise the power of appointment given her by the testator's will. Her nearest blood relation at her death was her only surviving sister; and her next of kin, according to the Statutes of Distribution, were her sister and several nephews and nieces.

The surviving sister, and her husband in her right, claimed the

L. JJ. 1868 HALTON v. FOSTER.

whole £4000. The others of the next of kin according to the statutes contended for a distribution as on intestacy. The Vice-Chancellor considered that the words "as if she had died unmarried" pointed to a distribution according to the statutes, and made a declaration accordingly.

Mr. *Osborne*, Q.C., and Mr. *Charles Hall*, for the Plaintiffs, in support of the appeal, referred to *Elmsley* v. *Young* (1); *Withy* v. *Mangles* (2); *Avison* v. *Simpson* (3); *Smith* v. *Campbell* (4); *Williams* on Executors (5).

Mr. *Jessel*, Q.C., and Mr. *Robinson*, for some of the next of kin according to the statutes:—

The words "next of kin" will mean next of kin according to the statute, if there be a reference in the gift to the statute or to intestacy: *Jarman* on Wills (6). Here there is an express intention to exclude the husband, and that is a reference to the statute and to intestacy, for it excludes a person who would take according to the statute in the event of intestacy. The gift is, therefore, in substance, a gift to those persons other than the husband who are entitled by law upon intestacy: *Cotton* v. *Scarancke* (7) supports our contention.

Mr. *North*, for a Defendant in the same interest.

Mr. *Stuart*, for other parties.

Sir W. Page Wood, L.J.:—

We do not think it necessary to hear a reply. The authorities which up to a certain point are distinctly applicable to this case have settled that the words "next of kin," without more, mean the nearest blood relations of the *propositus*. The words here, "next of kin in blood," are not less strong. I do not say stronger, for the words "in blood" appear only to indicate an intention to exclude affinity in favour of consanguinity. The question, then, is reduced to the narrowest limit—are the words "as if she had died unmarried"

(1) 2 My. & K. 780.
(2) 10 Cl. & F. 215.
(3) Joh. 43.
(4) G. Coop. 275.
(5) Page 1041, 6th Ed.
(6) Vol. ii. p. 96.
(7) 1 Madd. 45.

sufficient to distinguish the case from *Withy* v. *Mangles* (1). It is not desirable that a decision of the House of Lords should be departed from on account of unsubstantial distinctions. In *Withy* v. *Mangles* the Judges appear from the language they use to have considered an express reference to the statute necessary in order to vary the case, here there is nothing but an expression from which a doubtful inference may be drawn that the testator had the statute in his mind. It is indeed fairly arguable that what the testator aimed at by the use of the words "as if she had died unmarried" was to meet such a case as that of a daughter dying leaving children, who afterwards all died under twenty-one, and to provide that in such a case the fund in default of appointment should go to the persons who would have been her next of kin if she had never had a child, "unmarried" being read "without ever having been married." I prefer, however, to rest the decision on the broader ground that there are no words in the will which plainly and necessarily refer to the statute.

SIR C. J. SELWYN, L.J.:—

Mr. *Robinson* argues that if the testator gives to next of kin and excludes a person who would have taken under the statute, this shews that he meant by next of kin persons who are the next of kin according to the statute. This argument is founded on an assumption that the husband takes under the statute, which he clearly does not. Mr. *Jessel* contends that the next of kin must be ascertained according to the statute where there is a reference to intestacy, and he cites a passage from Mr. *Jarman's* book on Wills in support of this, but Mr. *Jarman* speaks of an express reference to intestacy, here there is no express reference, nor, in my opinion, anything from which a reference to intestacy can properly be implied. The case of *Cotton* v. *Scarancke* (2) decided nothing more than the question whether the half-blood were excluded. It was recognised as an authority on that question in *Grieves* v. *Rawley* (3), but I do not think that it has any application to the present case.

Solicitors for the Plaintiffs: Messrs. *Field, Roscoe, & Co.*
Solicitors for the Defendants: Messrs. *Eyre & Co.*

(1) 10 Cl. & F. 215. (2) 1 Madd. 45. (3) 10 Hare, 63.

L. JJ.
1868
April 21.

BAUMANN *v.* JAMES.

Statute of Frauds—Agreements made up of several Writings—Reference to other Writings—Specific Performance—Uncertainty.

A tenant applied to the landlord's solicitors as to the renewal of his lease. The solicitors sent him a report by a surveyor, who recommended the granting a lease for fourteen years at a given rent if certain repairs were done by the tenant. The tenant wrote back assenting to the repairs and rent, but asking for a term of twenty-one years. No final agreement was come to, but some months afterwards a negotiation having proceeded between the tenant and landlord without the intervention of the solicitors, the landlord wrote a letter promising the tenant a lease for fourteen years "at the rent and terms agreed upon," to which the tenant wrote back an unqualified acceptance:—

Held, that parol evidence was admissible to connect the report and the tenant's previous letter with the subsequent letters; and that it being conclusively established that there had never been any other rent or terms agreed upon than those mentioned in the report, there was a sufficient memorandum in writing to satisfy the *Statute of Frauds*.

The report provided for the tenant doing certain specified works and "other works" upon the property, and estimated the expense at from £150 to £200. The specified works being such as must evidently cost nearly that sum:—

Held, that there was no such uncertainty as to prevent specific performance.

Decree of *Stuart*, V.C., affirmed.

THIS was an appeal by the Defendant from a decree of Vice-Chancellor *Stuart* for specific performance of an agreement by him to grant a lease.

The Plaintiffs, in 1860, purchased the residue of a sub-lease in the property in question, which would expire in September, 1867. The immediate reversion was in one *Smyth*, and the freehold in the Defendant. In 1864 the Plaintiffs applied to Messrs. *Bannister*, the Defendant's solicitors, as to the renewal of their lease. The Defendant's solicitors employed Mr. *Roumieu*, a surveyor, to look over the property, and he made a written report, which was, in part, as follows:—

"It is Messrs. *Baumann's* intention, should arrangements be made for a lease, to further improve these premises in a substantial manner by putting on a new roof over the inclosed area, and taking off the present tiled roof from the other buildings, and

substituting slate instead, and doing other works which will make these premises much more valuable. I consider that if the contemplated improvements are carried out, which I estimate would cost from about £150 to £200, a lease might be granted Messrs. *Baumann* for fourteen years at a rent of £150 per annum, they insuring the premises in the joint names of the lessor and lessee for £1500 and one year's rent. Should Messrs. *Baumann* not be disposed to lay out any money upon the premises, but only do the trifling repairs now required, which do not amount to £20, a lease might be granted at a rent of £170."

The Defendant's solicitors sent this report to the Plaintiffs, who, on the 26th of May, wrote to the solicitors as follows:—

"We are in receipt of your favour of the 21st inst., and of Mr. *Roumieu's* report, and we are willing to do the repairs, and make the improvements mentioned therein; but considering what we have already expended, and what we are willing to expend, we would prefer having a lease for twenty-one years, and we shall be glad to hear that Colonel *James* assents to this. We consent to pay the rent of £150 assessed by Mr. *Roumien* as the value of the premises."

Nothing more appeared to have passed till the 17th of August, when the Defendant's solicitors wrote to the Plaintiffs as follows:—

"We wrote some time back to Colonel *James* respecting your wish to have a renewal of your lease for twenty-one years, and we did not hear from him till yesterday. He finds that it is not for the benefit of the property that he should grant leases for longer terms than fourteen years. . . . On hearing from you that you are willing to take a lease for fourteen years we will prepare and send you draft for perusal."

No concluded agreement was come to, and in January, 1865, the Defendant's solicitors informed the Plaintiffs that the Defendant wished to negotiate personally with the tenants. A correspondence accordingly began between the Plaintiffs and the Defendant, by a letter from the Plaintiffs on the 10th of January, 1865, which recapitulated what had passed between the Plaintiffs and Messrs. *Bannister*, and was, in part, as follows:—"Mr.

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Roumieu came to view the premises, and Messrs. *Bannister & Co.* sent us his report. Our reply to that report is dated the 26th of May, wherein we stated our willingness to pay the rent assessed, and to do the repairs, and to make the improvements, and accept a lease as proposed; but as we are willing to expend a considerable sum of money, we would prefer to have a twenty-one years' lease. . . . . Should you, however, be still disinclined to grant us a twenty-one years' lease, we will take it at fourteen years as proposed by Messrs. *Bannister* in their letter of the 17th of August."

Difficulties arose in consequence of its not being known when the lease vested in Mr. *Smyth*, which he refused to produce, would expire. On the 20th of March, 1865, the Plaintiffs wrote to the Defendant as follows:—

"As the dispute which you have with Mr. *Smyth* may not be settled for some time, we respectfully suggest to you to write us a letter that we are to have a lease for the term of years and at the rent agreed upon. This letter we would acknowledge, and then we could wait (if you still wished it) for our lease."

The Defendant, on the 21st of March, replied: "Until I have ascertained beyond a doubt the date of the determination of any existing lease I must decline to instruct Messrs. *Bannister* to prepare your new lease. In the meantime I have no objection to give you my promise of a new lease for fourteen years at the rent and terms agreed upon, such lease to commence from the termination of any lease now existing, or as soon as I have come to some understanding with Mr. *Smyth*."

The Plaintiffs, on the 22nd of March, answered: "We beg to acknowledge the receipt of your favour of yesterday, and accept your proposal for a fourteen years' lease at the rent and terms agreed upon."

The Defendant afterwards refused to grant a lease, and the Plaintiffs filed a bill for specific performance. The Defendant resisted this on the ground that he had only undertaken to grant a lease in the event of the property not being taken by the *Metropolitan Railway Company*, and that they had given notice to take it. He also claimed the benefit of the *Statute of Frauds*. The

argument both below and on the appeal was in a great measure directed to the question whether the agreement was conditional on the proceedings of the railway company, which is not considered to involve anything calling for a report.

The Vice-Chancellor made a decree for specific performance, with costs, from which the Defendant appealed.

Mr. *Pearson*, Q.C., and Mr. *F. C. J. Millar*, for the Appellant:—

There is no concluded agreement, for the letters of the 21st and 22nd of March, which are alleged to constitute one, do not contain the terms of the lease, nor refer to any document containing them, and parol evidence is not admissible to connect some other documents with them: *Skelton* v. *Cole* (1); *Clinan* v. *Cooke* (2).

[Mr. *C. Browne*, for the Respondents, referred to *Ridgway* v. *Wharton* (3).]

The circumstances of that case distinguish it entirely from the present. But supposing the connection to be established, *Roumieu's* report as to the works to be done is so vague that specific performance cannot be decreed.

Sir *Roundell Palmer*, Q.C., and Mr. *C. Browne*, for the Respondents, were not called upon.

SIR W. PAGE WOOD, L.J.:—

The Defendant having claimed the benefit of the *Statute of Frauds*, it is to be decided, and it is the only substantial question that is to be decided, whether there was a concluded agreement in writing. It struck me at first as a question of some difficulty whether the letters of the 21st and 22nd of March, which only mention "the rent and terms agreed upon," could be connected with *Roumieu's* report and the letter accepting some of its terms so as to make up an agreement in writing embodying the terms. The case of *Ridgway* v. *Wharton*, to some extent, removes this difficulty. In that case "instructions" were referred to. Now, instructions might be either by parol or in writing; but

(1) 1 De G. & J. 587. (2) 1 Sch. & Lef. 22.
(3) 6 H. L. C. 238.

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it was held that it might be shewn by parol evidence that instructions had been given in writing, and that there had been no other instructions than the written document which was produced. The earlier cases of *Shortrede* v. *Cheek* (1), and *Hodges* v. *Horsfall* (2), commented on in *Wigram's* Extrinsic Evidence (3), tend in the same direction. I take a similar view of the present case. Here is a reference to "rent and terms agreed upon." Now, Mr. *Roumieu's* written report contained terms which, with the exception of that relating to the length of the lease, were acceded to by the letter of the 26th of May. Whether Messrs. *Bannister* had any authority to enter into an agreement on the part of the Defendant was questioned, but what afterwards passed between the Plaintiffs and the Defendant appears to me to render that question wholly immaterial. The letter of the 21st of March itself defines the length of the term, and we have a previous written document containing terms which the Plaintiffs had agreed to in writing, and it is not suggested that there ever were any terms agreed to by parol, nor that there ever were any terms agreed to at all except those contained in the report of Mr. *Roumieu*, and the partial acceptance of the 26th of May. I say partial, because the question as to the length of the term was left open, so that there was not a concluded agreement. I am of opinion therefore that the report and the letter of the 26th of May are sufficiently connected with the letters of the 21st and 22nd of March, and that there is an agreement in writing within the meaning of the *Statute of Frauds*.

It was urged that the report is too vague as to the repairs to be done for specific performance to be decreed, inasmuch as it refers to "other works" without defining them. The report, however, defines with sufficient accuracy works of a substantial character, viz., the putting a new roof over the area, and substituting a slate roof for a tiled roof over the other buildings, and when we find that the whole expense was only to be from £150 to £200 it is impossible not to come to the conclusion that the "other works" were of such a trifling description that their being left undefined would not be a ground for refusing specific performance.

(1) 1 Ad. & E. 57. (2) 1 Russ & My. 116.
(3) Page 133.

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SIR C. J. SELWYN, L.J.:—

The question is whether there were any rent and terms agreed upon, or, substantially, as one of the Appellant's counsel admitted, whether the term of years and the rent were agreed upon. As regards the duration of the lease there can be no doubt, for the letters of the 21st and 22nd of March determine it. As regards the rent, it is clear that no other rent can have been referred to by the words "rent agreed upon" than the rent of £150 mentioned in the letter of the 26th of May and in Mr. *Roumieu's* report.

Solicitors: Mr. *Henry Harris;* Messrs. *Smith, Stenning, & Croft.*

KERSHAW *v.* VICKERS.

L. JJ.
1868
April 28.

Statutes 17 & 18 *Vict. c.* 82; 30 & 31 *Vict. c.* 64—*Jurisdiction of single Lord Justice—Appeal from Court of Chancery of County Palatine of Lancaster.*

The statute 30 & 31 Vict. c. 64, for the dispatch of business in the Court of Appeal in Chancery, does not enable one of the Lords Justices sitting alone to act as a Court of Appeal from the Court of Chancery of the County Palatine of *Lancaster*.

THIS was an application by the Defendants in a suit in the Court of Chancery of the Duchy of *Lancaster*, to discharge an order for service of the bill on the Defendants out of the jurisdiction of that Court.

The Plaintiff resided within the jurisdiction of the Duchy Court; both the Defendants in *Yorkshire*, out of the jurisdiction. On the 13th of January, 1868, the Plaintiff applied *ex parte* to the Lord Justice Lord *Cairns*, sitting alone, for leave to serve the bill on the Defendants out of the jurisdiction of the Duchy Court, and the order was made. The Defendants entered a conditional appearance, and now moved before the Lords Justices to discharge the order and the conditional appearance, on the ground that one Lord Justice sitting alone had no jurisdiction to make the order.

Mr. *Bunting*, for the appeal motion:—

One Lord Justice sitting alone does not constitute a Court of

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appeal from the Duchy Court, and the application was *coram non judice*: 17 & 18 Vict. c. 82, ss. 1, 2; 30 & 31 Vict. c. 64.

Mr. *Horsey, contrà* :—

The words "or under any other Act," contained in 30 & 31 Vict. c. 64, are unmeaning unless treated as applicable to 17 & 18 Vict. c. 82. The construction contended for on the other side is very inconvenient, for during the illness of one Lord Justice, or a vacancy in the office of Lord Justice, no order for service out of the jurisdiction could be obtained.

SIR W. PAGE WOOD, L.J. :—

There has been a slip here in applying to a Court which had no jurisdiction. The Act 30 & 31 Vict. c. 64, is an Act to provide for the dispatch of business in the Court of Appeal in Chancery, which is a Court consisting of the Lord Chancellor and Lords Justices, and it applies only to business coming before the Court of Appeal in Chancery. An argument has been attempted to be founded on the words "or under any other Act;" but neither the statute 17 & 18 Vict. c. 82, nor any other Act, gives the Court of Appeal in Chancery any jurisdiction as to suits in the Court of the County Palatine. No such denial of justice as is suggested by Mr. *Horsey* could take place, for the Chancellor of the Duchy, if applied to, could have sat with the Lord Justice Lord *Cairns*.

SIR C. J. SELWYN, L.J., concurred.

Solicitors: Messrs. *Bower & Cotton*; Mr. *G. E. Spencer*.

Ex parte FOXLEY. *In re* NURSE.

L. JJ.
1868
April 18.

Bankruptcy—Assignment of Property to defeat Creditors—Reservation of Furniture and Book Debts—Substituted Security.

A trader conveyed all his property, except his furniture and book debts, to a creditor for securing a previously existing debt:—

Held, that, notwithstanding the reservation, the deed was fraudulent and void, inasmuch as it placed the bulk of his property out of the reach of his other creditors.

A trader gave a bill of sale of his stock in trade to *A.* in consideration of his indorsing a bill which the trader discounted, but the bill of sale was not registered. Nine months afterwards he executed an assignment of the bulk of his property to *A.* to secure the same debt and further advances:—

Held, that the assignment, being otherwise fraudulent, could not be supported on the ground that it was a substitution for the first bill of sale.

THIS was an appeal from a decision of Mr. Commissioner *Holroyd*. The circumstances were as follow:—

Mr. *Nurse*, the bankrupt, who was a carriage builder, upon the occasion of the purchase of the business from his father, applied to the *National Bank* to discount a bill for £2000, drawn upon him by his father, and this the bank agreed to do upon the bill being indorsed by Mr. *E. Lewis*, who was the bankrupt's solicitor. Mr. *Lewis* consented to this, but required security, and the bankrupt then gave him a bill of sale, dated the 26th of November, 1865, by which he conveyed the greater portion of his stock in trade and implements to secure the repayment of the £2000. This deed was executed upon the understanding that it was not to be registered under the *Bills of Sale Act*, but was to be renewed from time to time.

On the 24th of August, 1866, the bankrupt executed another bill of sale, by which, after reciting that the bankrupt was indebted to Mr. *Lewis* in the sum of £2000, secured by the indenture of the 26th of November, 1865, and in £573 for further advances, the bankrupt assigned to Mr. *Lewis* all his plant, stock in trade, and effects enumerated in the inventory annexed to the deed, and also conveyed the lease of certain premises in *Crawford Street*, subject to a charge upon it, and also a policy of assurance on the life of

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the bankrupt for £2000, for securing the repayment of the sum of £2573, with further advances, not exceeding in the whole £2800.

At the time of executing this deed the bankrupt was much pressed by creditors, and on the 12th of November, 1866, he gave notice to the administratrix of Mr. *Lewis*, who was then dead, of his embarrassed circumstances. She accordingly took possession of the property comprised in the bill of sale, and on the following day the bankrupt presented his petition to the Court, and was adjudicated bankrupt.

The property comprised in the assignment included the whole of the bankrupt's property, with the exception of his furniture and book debts. The furniture was subsequently sold, and produced £400. The book debts were valued by the bankrupt at £800, but he stated at the same time that he considered only £600 of that amount hopeful, and those debts were not immediately available, as he had endeavoured to get them in without effect.

The property comprised in the assignment was sold, with the consent of all parties, for £1770 1*s.* 10*d.*, and the lease for £800, and these sums were claimed by the administratrix of Mr. *Lewis*, and also by the assignees. The Commissioner was of opinion that the assignment of the 24th of August, 1866, if considered solely with reference to the amount of property of the bankrupt not included in its operation, was *primâ facie* fraudulent, and an act of bankruptcy. But he was also of opinion that the assignment could be supported on the ground that it was executed in pursuance of a *bonâ fide* agreement made at the time of the first bill of sale, and must be treated as if dated on the 26th of November, 1865; and that as that date was more than a year before the petition for adjudication of bankruptcy, and the deed had been made for a good consideration, for the purpose of enabling the bankrupt to continue his business, the deed might be supported. The important portions of the learned Commissioner's judgment are referred to in the judgments of the Lords Justices.

From this decision the assignees appealed.

Mr. *De Gex*, Q.C., and Mr. *Reed*, for the Appellants:—

We contend, first (on which point the Commissioner was with us) that the assignment of the 24th of August, 1866, inde-

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pendently of the previous transaction, was void against the assignees, and an act of bankruptcy, inasmuch as it conveyed substantially the whole property of the bankrupt. It was, in fact, a conveyance of the whole "solvency" of the bankrupt. The reservation of the furniture and book debts was not enough to take it out of the general rule: *Lindon* v. *Sharp* (1); *Stanger* v. *Wilkins* (2); *Ex parte Sparrow* (3); *Ex parte Bailey* (4); *Ex parte Bland* (5); *Goodricke* v. *Taylor* (6); *Young* v. *Fletcher* (7).

Secondly: We say that the previous transaction affords no reason for supporting the assignment. There is nothing to connect the first bill of sale with the second. It was no part of the agreement for the first that a further security should be given. In order to support such an assignment there must be some equivalent bringing benefit to the other creditors, either by enabling the trader to continue his business or to pay his creditors. In the present case there was no benefit to any one but Mr. *Lewis*: *Leake* v. *Young* (8).

Mr. *Karslake*, Q.C., and Mr. *Bagley*, for the administratrix of Mr. *Lewis*:—

The reservation of the furniture and trade debts was a substantial reservation. Their value, as they were then estimated, was considerable. It was not a business which required much capital, as the bankrupt bought old carriages and repaired and sold them at a profit. It could not be said to be an assignment of his solvency, for, in fact, he carried on the business for several months afterwards: *Smith* v. *Timms* (9); *Johnson* v. *Fesemeyer* (10); *Balme* v. *Hutton* (11).

There was good consideration for the second deed. It is not necessary that there should be an equivalent in money to support such a deed. The creditor might have seized the stock in trade at any moment under the first bill of sale; and his forbearance was a substantial advantage both to the debtor and the other

(1) 6 Man. & G. 895.
(2) 19 Beav. 626.
(3) 2 D. M. & G. 907.
(4) 3 Ibid. 534.
(5) 6 Ibid. 757.
(6) 2 H. & M. 380; S. C. 2 D. J. & S. 135.
(7) 3 H. & C. 732.
(8) 5 E. & B. 955.
(9) 1 H. & C. 849.
(10) 3 De G. & J. 13.
(11) 2 Y. & J. 101.

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creditors. The deed was a substitute for the previous security; and that has been held sufficient to support such an assignment: *Woodhouse* v. *Murray* (1); *Bittlestone* v. *Cooke* (2); *Hutton* v. *Cruttwell* (3); *Harris* v. *Rickett* (4); *Mercer* v. *Peterson* (5); *Anon.* (6); *In re Colemere* (7).

SIR W. PAGE WOOD, L.J.:—

The only matter now before us is the order by which the learned Commissioner declared the second security to be unimpeachable, and the only question, therefore, which we have to decide is whether that instrument is or not a valid security. We are of opinion that the instrument in question cannot be sustained. By it the debtor conveyed substantially all his property to one of his creditors without receiving any money or other equivalent advantage which would enable him to carry on his business or pay his other creditors—the very kind of security which was struck at by the Act as tending to defeat or delay creditors.

It was said, indeed, that the debtor did not convey the whole of his property, but made two reservations, namely, the furniture and the book debts. In judging of the effect of these reservations, it is convenient, as the Commissioner has well observed, to consider in the first place how the case would have been as to the validity of the instrument if it had stood alone, before considering the effect of the antecedent circumstances. I have come to the same conclusion as he did on the first point, that by itself the security could not have been supported. The facts are well stated by the Commissioner in his judgment. He says:—"At the time of the execution of that deed, the bankrupt was certainly insolvent, or if not, the deed would necessarily produce insolvency. He was pressed and sued by creditors, and was unable to meet his engagements. An execution was also upon his premises. He owed £3000 beyond the amount secured by the deed, and his embarrassments were known to Mr. *Lewis*, who was his solicitor. In addition to this, the deed in its terms was to secure a pre-existing debt of

(1) Law Rep. 2 Q. B. 634.
(2) 6 E. & B. 296.
(3) Ibid. 15.
(4) 4 H. & N. 1.
(5) Law Rep. 2 Ex. 304.
(6) 9 W. R. 199.
(7) Law Rep. 1 Ch. 128.

£2573, and further advances, not exceeding £2800 in the whole; but there was no stipulation for any further advance. Although the deed did not purport upon the face of it to convey all the trader's property, I think that, from the evidence contained in the examinations of the bankrupt and his foreman, it did in fact substantially convey all that he had at that time, for the value of his book debts and furniture, which were not included in the assignment, was small compared with the amount of his unsecured liabilities. His furniture produced him £400, and although he reckoned his book debts to amount to the sum of £800, he considered only £600 of that amount as hopeful, and those were not available, "as he had endeavoured to get them in, but without effect."

The question, therefore, is, whether the assignment so made, with no agreement to make any further advance, with no more reservation than this, did not put the debtor in such a position that he delayed and hindered creditors who might desire to enforce their claims. In holding that it had this effect, we do not go beyond the decided cases. The principal authorities are commented on by the Commissioner. They certainly bear out the conclusion to which he came. Their effect is well expressed by Baron *Parke*, in *Smith* v. *Cannan* (1), where he says:—"The test is not whether the necessary effect of the deed is to stop the trade, but whether its necessary effect is to delay the creditors of the trader." In the present case if the deed had been made available the creditor would have been able to delay the other creditors.

Again, in *Woodhouse* v. *Murray* (2), Lord Chief Justice *Cockburn* says: "The words of *Parke*, B., in *Sierbert* v. *Spooner* (3), are: 'I take it to be perfectly well settled that where a trader makes an assignment of all his effects, or of all except a very small portion, it is necessarily an act of bankruptcy, without any actual fraud.' He then refers to the several cases, which it is unnecessary for me to go over; and it was decided that an assignment by a trader of all his effects to a creditor was an act of bankruptcy. Yet the statute speaks of a fraudulent conveyance with intent to defeat and delay creditors. The meaning of the learned Judge, and the principle

(1) 2 E. & B. 35, 45. (2) Law Rep. 2 Q. B. p. 638.
(3) 1 M. & W. p. 718.

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upon which the cases have been decided, is, that though there may be an absence of fraud in fact, that is, intentional fraud, yet when the effect of such a conveyance is to put it entirely out of a man's power to go on with his business and to meet his creditors, there he must be taken to have intended the consequence of what he has done, and though not guilty of intentional fraud, or, as we call it, moral fraud, yet he is guilty of fraud against the policy of the bankrupt law, which is, that there should be an equal distribution among all the creditors."

There cannot be any difference in the mode of judging of such an assignment in the Courts of common law and equity. Where a trader assigns everything, being at the time sued by two creditors, and with an execution put in by a third, and reserves only his furniture and book debts, I cannot doubt to what conclusion the Court ought to come.

As to the argument that he carried on his business notwithstanding the deed, that has no force; for the question is, what would have been the effect if the creditor had chosen to enforce the deed. He could have swept away the whole of the property.

Another argument much pressed upon us was this: It is said that the creditor was in a condition under the former deed to seize the property immediately, and that the debtor got an equivalent in his creditor not enforcing the former deed by seizing the property. But that was no advantage to his other creditors. No time was given him to enable him to pay them. On the contrary, the new security gave power to *Lewis* to seize the property on demand of the debt. What equivalent to the bankrupt and his creditors was the cancelling of the old security if he gave a fresh security which he might also immediately enforce?

Therefore we agree with the Commissioner that, standing by itself, the assignment of the 24th of August, 1866, cannot prevail. I regret that I cannot agree with him also with respect to the effect of the former deed. The debtor gave a security to cover the risk of *Lewis* in indorsing the bill. I am not prepared to say that that was not in itself an equivalent which would have supported a bill of sale. But the case here is something different. The bill of sale was not registered, but it is attempted to support it as forming a consideration for the assignment in this manner:—It is said that

there are numerous authorities that if there be an agreement, even by parol (provided it be in a case not touched by the *Statute of Frauds*), *bonâ fide* made for giving a security, the security will prevail though it be made at some time after. There is no dispute that this is the law, and the Commissioner thus applies it to the present case: He says, "I may here state that the amount borrowed from the *National Bank* was £5000, and that at the time of giving the second bill of sale, that is, the mortgage of the 24th of August, 1866, the whole of that sum had been paid off by the bankrupt, with the exception of £400, the repayment of which had been secured by a charge upon the premises. Now, if the first bill of sale be displaced, that of the 24th of August, 1866, was, in truth, executed by the bankrupt in pursuance of a previous *bonâ fide* agreement, founded on an honest and present consideration for the subsequent giving of a bill of sale, the object of the bankrupt being to raise money, by the discount of the bill for £2000, to enable him to go on with his trade. In this view of the case, so far as regards the assignment of the property and effects comprised in the schedule, the mortgage of the 24th of August, 1866, must be taken as if it had been given and dated on the 26th of November, 1865, and the discount of the bill obtained upon *Lewis* indorsing it on the 26th of November, 1865, and the bill of sale afterwards made, must be treated as parts of the same transaction. Taking the mortgage, therefore, to the extent I have mentioned, as dated on the 26th of November, 1865, that would be more than a year before the filing of the petition for adjudication, and this will dispose of any question as to the deed being *per se* an act of bankruptcy." I am sorry that I am not able to follow that argument. I think that, as Mr. *Reed* well argued, the first deed was the subject of a distinct agreement, and that *Lewis* had all that he stipulated for. It was not to include all the property, and nothing was said about any further deed being executed. All was concluded and done. It is impossible to import anything of that transaction into the second. The second deed does not profess to enforce the former security; it merely recites it, and then gives a fresh security. It is not possible to tie the two transactions together; there is a clear gap between them. I think, therefore, that the Commissioner's order must be discharged.

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SIR C. J. SELWYN, L.J.:—

The order appealed from is this: "I do hereby declare that the mortgage of the 24th of August, 1866, is a good and subsisting mortgage." That declaration, therefore, and the order based upon it, are the only matters before us, and, consequently, the validity of the deed is the only question for us to decide. This naturally divides itself into two points. First: The Commissioner has said that he takes it to be established by the evidence that the bankrupt, by the assignment, "did, in fact, substantially convey all that he had at that time," and that "by executing the deed he deprived himself of the power of carrying on his trade, and withdrew the bulk of his property from the reach of his other creditors." In these words he has very tersely and properly described the effect of the evidence. The authorities bear out the view taken by the Commissioner. A reference to a short passage in the judgment of Lord *Chelmsford,* in *Johnson* v. *Fesemeyer* (1), will shew that it is not inconsistent with the Commissioner's opinion. He says: "The assignment is not of any portion of the trade effects, but of an equity of redemption. How did this assignment cripple the bankrupt in his trade? It may be said that indirectly it would have that effect, because he might have been enabled to raise money upon his equity of redemption, with which his trade might have been carried on. But this appears to me to be rather too remote in effect to come within the principle upon which alone the transaction can be rendered invalid as putting a stop to the bankrupt's trade."

Therefore on the first point I agree with the Commissioner's decision. But as to the second, I have come to a different conclusion. The Commissioner puts the case upon the ground that the second deed was founded upon a previous agreement. It was admitted at the bar that there was, in fact, no such agreement; but Mr. *Karslake* contended that the Commissioner did not put it in so strong a way as he might have done in favour of Mr. *Lewis,* for he was really in a better position than he would have been if there had been such an agreement. But what was the position of Mr. *Lewis* at that time? In the previous year there had been an agreement

(1) 3 De G. & J. p. 23.

for a bill of sale, which it was agreed should not be registered: and he did accordingly, on the 26th of November, 1865, obtain such a bill of sale, which, in pursuance of the arrangement before referred to, was not registered. Mr. *Lewis*, therefore, got the very security for which he stipulated; he was placed precisely in the position in which, by the arrangement, he was to be placed; and I am unable to see how this arrangement, or its consequences, can be considered, as the learned Commissioner has considered it, as an agreement for a subsequent bill of sale, or, as Mr. *Karslake* treats it, as putting Mr. *Lewis* in a better position than if such an agreement had been actually made. I do not wish to add more to what my learned brother has said on this part of the case, but as we were pressed by the authority of *Woodhouse* v. *Murray* (1) I will refer to the words of Lord Chief Justice *Cockburn* in that case. He says: "On this one exception has been engrafted: it is where the trader in disposing of his effects gets something which to him and his creditors is an equivalent; and *Bittlestone* v. *Cooke* (2) shews that an equivalent need not be an actual equivalent in point of value. . . . It may be that, under the pressure of some extraordinary exigencies, the trader, with an honest object of saving himself from bankruptcy and ruin, with a view to his own benefit and that of his creditors, and with an honest and *bonâ fide* desire to carry on his trade, pledges his effects, even the whole of them, to realize a sum of money which may fall very far short of their value; yet, looking at all the circumstances, it is so plain the intention was an honest one not to get a sum of money to put into his pocket, but in order to carry on his business, that such an assignment of all his effects would not be considered an act of bankruptcy." I think it is plain that the exception means that he must obtain something to enable him to maintain his business. There was nothing of that kind here. The same observations apply to *Mercer* v. *Peterson* (3). It is there said by Lord Chief Baron *Kelly*: "This agreement, therefore, appears to me to be good and valid, and founded on an honest consideration, that, namely, of what I regard as a present advance of money to the debtor." Here there was no advance of money. Again, in *In re Colemere* (4) the Lord Chan-

(1) Law Rep. 2 Q. B. p. 638.
(2) 6 E. & B. 296.
(3) Law Rep. 2 Ex. p. 309.
(4) Ibid. 1 Ch. p. 132.

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cellor says: "To this general doctrine a very reasonable qualification has been introduced, that the assignment to be fraudulent must be an assignment not for the purpose of raising money to enable the trader to go on with his trade, but for the purpose of paying some favoured creditor, or making some payments to all his creditors otherwise than through the Court of Bankruptcy. In either of these cases it is an act of bankruptcy. But if it is for the purpose of enabling him to raise money to go on with his trade, that cannot be called a fraudulent act as tending to defeat and delay his creditors, for it probably is or may be the wisest step he could take to promote the interests of his creditors." The consideration of these cases appears to me to shew that the exceptional case in which such an assignment will be supported is where the object of the trader is to sustain his trade, and make provision for payment of his creditors. Where this object does not exist the exception does not arise. I am therefore of opinion that the order in the present case must be discharged. All that we now declare is that the deed of the 24th of August, 1866, is invalid. We say nothing as to the effect of the first deed.

Solicitors for the Appellants: Messrs. *Treherne & Wolferstan.*
Solicitors for the Respondent: Messrs. *Tucker & New.*

L. JJ. 1868 *April* 20.

CARR *v.* BENSON.

Mining License—Extent of Right thereby conferred—Subsequent Lease by the Licensor to another person—Priority of Possession—"Workable Coal Seam."

By a deed dated the 29th of September, 1854, *R.* demised to *C.* a certain fire-brick manufactory, and by the same deed he granted to *C.* power to dig fire-clay from under certain lands therein described, the term of the demise and license being twenty-one years from the 6th of April, 1854. By a deed dated the 31st of August, 1862, *R.* demised to *B.* all the coal mines and seams of coal, "and also all the mines, seams, veins, or beds of ironstone and fire-clay found in connexion with such coal seams as are workable as coal seams," under the same lands as those to which *C.'s* license applied, for the term of forty-two years from the 22nd of November, 1858. In August, 1866, *C.* commenced opening an old pit, called the *Montague Pit*, with the intention of reaching a seam known as the *Stone Coal Seam*, in order to work the fire-clay in connexion with that seam. Previously to this, in the year

1864, *B.* had sunk a pit through the *Stone Coal Seam*, to get at a lower coal seam, and he had taken samples of the fire-clay in the *Stone Coal Seam*, some of which samples he had sent to *C.* to be tested, and he had afterwards sold some of the fire-clay to *C.* for the purpose of being manufactured. After *C.* had expended a considerable amount of money on his works at the *Montague Pit*, but before he had reached the *Stone Coal Seam*, *B.* gave notice to him that he (*B.*) had already proved the *Stone Coal Seam*, and was about to work it, and that it would be an invasion of his rights if *C.* were to work that seam. Ultimately *C.* filed his bill to restrain *B.* from working the fire-clay or the coal in the *Stone Coal Seam* under any part of the lands to which *C.*'s license applied during the continuance of *C.*'s term. Vice-Chancellor *Stuart* made a decree for an injunction:—

Held, upon appeal, that the words "coal seams workable as coal seams," must be construed regard being had to all and every the powers conferred by the lease in which those words were found, and that, looking at those powers and at the evidence, which, in the opinion of the Court, shewed that the *Stone Coal Seam* was workable at a profit when both the coal and the fire-clay were taken into account, that seam must be considered to be comprised in *B.*'s lease:

Held, also, that as *C.*'s license was not an exclusive license, the licensor had still a right to deal with the property comprised in that license in any manner not inconsistent therewith:

Held, also, that *B.* had first taken possession of the *Stone Coal Seam*, and that *C.* had no right to an injunction to restrain *B.* from working that seam:

Held, also, that no knowledge could be imputed to the licensor of the extent of *C.*'s business, or of the probability that he would require for the purposes of that business during his term of twenty-one years the whole of the fire-clay lying under the lands comprised in his license.

Bill dismissed with costs.

THIS was an appeal by the Defendant *Benson* from a decree made by Vice-Chancellor *Stuart* on the hearing of this cause, granting an injunction to restrain the Defendant from working a certain vein of coal and fire-clay.

By an indenture dated the 29th of September, 1854, and made between Lord *Rokeby* (the lessor) of the one part, and *Thomas Carr* and the Plaintiff *William Ridley Carr* (the lessees) of the other part, in consideration of the certain and other rents and sums of money thereby reserved, and of the covenants thereinafter contained on the part of the lessees, the lessor demised to the lessees, their executors, administrators, and assigns, a certain fire-brick manufactory and premises at *Scotswood*, in *Northumberland*, then in the occupation of the lessees, "together with full power and authority to and for the said lessees, their executors, administrators,

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and assigns, to dig, work, and burn the fire-clay, and convert or manufacture the same into fire-bricks, chimney tops, retorts, and other things made of fire-clay, for sale, as the same business has been hitherto conducted and carried on, such fire-clay to be worked and obtained in, out, and from the lands and grounds" in the said indenture particularly described, and delineated on the plan No. 2 thereto annexed; "and also to work the ironstone and coal to be found in connexion with such fire-clay for the purposes of the said manufactory." This indenture contained certain other powers which it is not necessary to state. The term was for twenty-one years from the 6th of April, 1854. There was a rent certain of £92 10*s.*, and a rent of 2*s.* for every thousand bricks made and sold during each year of the term from off the premises, a further rent of 2*s.* for all such fire-clay as should be equivalent in measure and weight to 1000 bricks used in each year of the term in the manufacture of chimney tops and other articles, a further rent of 6*d.* per ton of twenty cwt. for every ton of raw fire-clay sold in each year of the term by the lessees, and the further rent of 6*d.* per ton of like weight for every ton of ironstone gotten during each year of the term in working the fire-clay. No rent to be charged in respect of coal found in connection with such fire-clay as might be gotten in working such fire-clay, provided such coal were used only for the purpose of manufacturing the fire-clay.

By an indenture dated the 31st of August, 1862, and made between Lord *Rokeby* (the lessor) of the one part, and the Defendant *William Benson* (the lessee) of the other part, in consideration of the rents thereby reserved, and of the covenants on the part of the lessee therein contained, the lessor demised unto the lessee, his executors, administrators, and assigns, "all and every the collieries, coal mines, and seams of coal, as well opened as not opened, except as hereinafter are excepted, and also all the mines, seams, veins, or beds of ironstone and fire-clay found in connection with such coal seams as are workable as coal seams, within and under, or which can, shall, or may be dug, won, wrought, and gotten from, in, forth, and out of all the lands and grounds of him, the said lessor, called or known as *East Denton* and *West Kenton Royalty*, otherwise *Montague Main Colliery*, in the county of *Northumberland*."

This indenture contained certain other powers and privileges not necessary to be stated for the purpose of this report, and the words of exception (so far as material) were: "Except and always reserved unto the said lessor, his heirs and assigns, and his and their trustees and lessees, full and free right, power, and liberty to bore, or otherwise search for, win, and work any mines or minerals or quarries whatsoever in or under the said lands and grounds hereinbefore described, other than the mines, seams, beds of coal, and the ironstone and fire-clay found in connection with such coal seams as are workable as coal seams and hereby demised." The demise was for the term of forty-two years from the 22nd of November, 1858, subject to determination as therein mentioned. The rents payable were: a rent certain of £400 per annum, and also, during the first seven years of the term, a rate for the coals of 10*s.* 6*d.* per ton of the weight therein mentioned, and during the remainder of the term a rate of 12*s.* 6*d.* per ton of the same weight; and also a "rent or sum of 6*d.* per ton of 22½ cwt. for all ironstone and fire-clay that shall be wrought or gotten by the said lessee, his executors, administrators, or assigns, out of or from such of the mines, seams, beds or veins hereby demised, as may be found in connection with the coal seams." The lands comprised in this indenture were the same as those under which the license to dig fire-clay was given by the indenture of the 29th of September, 1854.

In August, 1866, the Plaintiff desired to work a bed of fire-clay lying in connection with a thin seam of coal called the *Stone Coal Seam*, which was under part of the land comprised in plan No. 2 annexed to the indenture of the 29th of September, 1854. In order to satisfy himself that in so doing he would be duly exercising the powers conferred on him by that indenture, he applied to Lord *Rokeby's* mineral agent for permission to open an old pit known as the *Montague Pit* (which it was necessary to open in order to reach the *Stone Coal Seam*), and he received a written permission from the agent to open the *Montague Pit* for that purpose. The Plaintiff thereupon immediately began his works at the *Montague Pit* and expended a large sum of money upon them, and ultimately reached the *Stone Coal Seam*, and commenced working it, as he alleged, at a profit.

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The Plaintiff, by his bill, alleged that in March, 1867, he heard for the first time that the Defendant *Benson* was about to work the *Stone Coal Seam* from another pit lying about 230 yards to the east of the *Montague Pit*. The Plaintiff further alleged that the Defendant *Benson*, in May, 1867, actually commenced working the *Stone Coal Seam*, but only in an experimental manner; and that after working about a fortnight, he desisted, and did not work it again till July, 1867. Various communications afterwards took place between the parties, each denying the right of the other to work the *Stone Coal Seam*, and ultimately the Plaintiff filed the bill in this suit on the 7th of January, 1868, and thereby prayed for an injunction to restrain the Defendant during the continuance of the Plaintiff's interest under the indenture of the 29th of September, 1854, from working or removing any part of the fire-clay connected with the *Stone Coal Seam*, or any coal forming part of that seam under any part of the lands comprised in the plan No. 2 annexed to the indenture of the 29th of September, 1854.

The Vice-Chancellor, at the hearing of the cause, granted an injunction during the continuance of the Plaintiff's term; and from this decree the Defendant *Benson* appealed.

There was a considerable amount of evidence on the question whether the *Stone Coal Seam* was "workable as a coal seam." From the view which the Court took of the case, it is only necessary to state that in their opinion the evidence established that the *Stone Coal Seam* was workable commercially at a profit when both coal and fire-clay were taken into account.

The Defendant *Benson*, in an affidavit which he made, stated that in the year 1864 he made a pumping-engine pit through the *Stone Coal Seam*, in order to give the greatest possible facility for removing the water from the land, and that in sinking this pumping-engine pit the *Stone Coal Seam* and the fire-clay forming the floor thereof were discovered in the month of June, 1864, though neither the seam nor the fire-clay had been then discovered as a workable seam of coal or fire-clay at another pit belonging to the Defendant (called the drawing pit) which passed through them, in consequence of a trouble (or fault) which existed there. The Defendant *Benson* went on to say: "About February or March, 1866, I began to work the *Stone Coal Seam*, and the fire-

clay forming the floor thereof, by way of experiment, and I sent a portion of the said fire-clay, and also some fire-clay from the floor of the *Brockwell Seam*" (a lower seam), "to the Plaintiff to be made into bricks for use, in order that the qualities and value of the said two kinds of fire-clay might be ascertained. After the fire-clay was sent by me to the Plaintiff as aforesaid, I sold to the Plaintiff fire-clay obtained by me from the floors of the said *Brockwell Seam* and the *Stone Coal Seam* respectively; and from the fire-clay so sent and sold by me to the Plaintiff as aforesaid the Plaintiff was enabled to ascertain the quality and value of the fire-clay which forms the floor of the *Stone Coal Seam.* In the month of December, 1866, I, for the first time, heard that the Plaintiff had commenced opening out and deepening an old pit in the lands from which the Plaintiff alleges in his bill that by the said indenture of the 29th of September, 1854, he is empowered to dig, work, and burn the fire-clay, and on the 13th of the same month I wrote a letter of that date to the agents of Lord *Rokeby*, and I caused a letter to be written to the Plaintiff on the 6th of March, 1867, and sent to him therein a copy of the letter which I had written to the agents of Lord *Rokeby.*"

The Plaintiff, in his evidence, contradicted to some extent the Defendant *Benson's* statements as to the sending of samples of fire-clay, and selling fire-clay, to the Plaintiff, and the dates connected therewith, but he admitted having received the letter of the 6th of March, 1867, with its enclosure.

The letter of the 13th of December, 1866, from *Benson* to Lord *Rokeby's* agents was (so far as material) as follows: "I was somewhat surprised a day or two ago at being told that Mr. *W. R. Carr* was sinking down to the *Stone Coal Seam* which I had proved a short time ago. I hardly believed the report, but I observed yesterday that an engine-house to the north of Mr. *Carr's* brick works was nearly completed for some such purpose. Of course I cannot do anything in the matter until a breach is made in the said seam, only I think it right to say that it will be my business and duty to prevent any such trespass on my rights."

The letter of the 6th of March, 1867, written by a clerk of *Benson* to the Plaintiff, and enclosing a copy of the letter of the 13th of December, 1866, contained the following passage: "I am

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desired by Mr. *Benson* to say that if it is your intention to sink to and work the *Stone Coal Seam* and clay below it, as has been reported to him, he will be constrained to bring an action against you for trespass, as such seam he is prepared to work in the usual way of working coal seams, and which he has already partially worked."

Mr. *Dickinson*, Q.C., and Mr. *Bush* for the Appellant:—

The *Stone Coal Seam* is a workable seam within the meaning of the Appellant's lease, and is therefore included in the demise. The Appellant is also entitled as against the Plaintiff to work that seam, inasmuch as the Plaintiff's license was not exclusive, and Lord *Rokeby* had therefore power to grant the lease to the Appellant: *Collier* on Mines (1); *Lord Mountjoy* v. *Earl of Huntingdon* (2); *Chetham* v. *Williamson* (3); *Doe* v. *Wood* (4). The evidence proves that the Appellant took possession of the *Stone Coal Seam* before the Plaintiff. The bill ought, therefore, to have been dismissed.

Mr. *Bacon*, Q.C., and Mr. *Wickens*, for the Plaintiff:—

The *Stone Coal Seam* is not a workable seam within the meaning of the Defendant's lease, and he is consequently a mere trespasser. But if that be not so the Plaintiff's license cannot be defeated by the Defendant's subsequent lease, as it is clear from the evidence that the Plaintiff had taken possession of the *Stone Coal Seam* by commencing to sink the *Montague Pit* in 1866 before the Defendant began his working. It was not necessary that the Plaintiff should have actually reached the seam first. Though a license such as the Plaintiff's cannot *primâ facie* be taken to be exclusive, still the grantor cannot derogate from his own grant. He knew what kind of a business the Plaintiff was carrying on, and the evidence clearly shews that the whole of the fire-clay under the lands included in the license would be required for the purposes of the Plaintiff's manufactory during the term of twenty-one years granted to him. The license, therefore, would be practically an exclusive license: *Newby* v. *Harrison* (5). The

(1) 2nd Ed. p. 10.
(2) Godbolt, 17.
(3) 4 East, 469.
(4) 2 B. & A. 724.
(5) 1 J. & H. 393; 3 D. F. & J. 287.

Vice-Chancellor's decree is right, and the appeal ought to be dismissed.

SIR W. PAGE WOOD, L.J.:—

One main point in the case (and perhaps I had better consider it first) is, whether or not the demise to the Defendant includes the property in question, because, if that be not so, he was a mere trespasser, and though some questions might arise as to what the right of the Plaintiff under the terms of his license might be against a mere trespasser, at all events his position would be much better as against a mere trespasser than as against a lessee.

Now it appears to me that the lease granted in 1862 does distinctly include the property in question. As I understand from the evidence, the lease includes such seams of coal under all the lands comprised in the license as are workable as coal seams: and we must first consider what is meant by the words "workable as coal seams." In determining this, I think we must take the whole lease as one entire instrument, and that the only reasonable construction to be put on a grant of this description is, that it is a grant of all those seams which shall be workable as seams of coal, regard being had to all the powers conferred by the lease. The lease not merely confers a power of working, but contains an absolute demise of, the fire-clay which is found in connection with the workable seams of coal; so that we have certain seams of coal demised, and we have also seams of fire-clay demised, with power to work the fire-clay and an obligation to pay rent for it. Therefore we must consider that the lessor had in his mind that he was parting with a valuable right in the fire-clay, for which the lessee was to pay rent.

Then the whole question is reduced to this—is or is not this a workable seam of coal, regard being had to the circumstance that the lessee has power to raise fire-clay connected with the seam of coal? If the seam of coal be workable he must pay rent for the fire-clay and pay rent for the coal, and the question is, whether being placed in that position the seam becomes to him a workable seam? Now on this question there is really no conflict of evidence, it being plain that taking coal and fire-clay together the seam can be worked at a profit.

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We are invited to adopt a narrow construction and say that because the lease says "workable as coal seams," it refers only to coal seams workable at a profit as coal seams, independently of the fire-clay. But the answer to that is, that the seam is workable as a coal seam, and the lease gives to the lessee the fire-clay underneath that he may make it a useful and available coal seam. One great difficulty in working such thin coal seams at a profit is that a great quantity of other material must be dug out in order to make the excavation high enough to work in. This being foreseen, it is in effect said by the lease that whatever other material the lessee cuts out he shall have, and that if it be fire-clay he shall pay a rent for it, so that having the advantage of that fire-clay he will get "a workable coal seam." It is worked as a coal-seam, and the lessee gets the fire-clay besides. It appears to me therefore, to be impossible to say there has not been a good and effectual demise of the *Stone Coal Seam.*

That being so, the Defendant is not a trespasser, but is a person in legal possession of property demised to him, including the fire-clay in question.

Then the Plaintiff sets up a paramount title, under a license given him in 1854, to work all the fire-clay and the coal in connection with the fire-clay, and alleges that the acts of the Defendant are an invasion of that right. The judgment of the Vice-Chancellor seems to have rested mainly upon that. His Honour says: "The lessee of a colliery and coal-works has a right to work fire-clay found in connection with that coal. Now if the Plaintiff's lease bears the construction, which seems to be the legitimate one, of an unconfined right to work fire-clay wherever it is found, the lessor has no right without the consent of the first lessee to grant the fire-clay over again, or to grant any fire-clay." His Honour here does not appear to have kept in view the important distinction between a lease and a license. The Plaintiff's license, it is conceded, is not an exclusive license, and it has been held from the earliest period that a man taking a license where he is under no obligation to work cannot exclude his licensor from granting as many more of those licenses as he thinks fit, provided always that they are not so granted as to defeat the known objects of the first licensee in applying for his

license. The Vice-Chancellor afterwards says: "I think it is explained by this, that as to fire-clay found under or in connection with a seam of coal which was workable profitably and for commercial purposes as a coal seam, it could not be worth anybody else's while to work that fire-clay. If the subsequent lease has a more extensive meaning, I have yet to hear a legitimate argument to shew that this lessor had any right to demise over again the fire-clay which he had demised to the first lessee." In both these passages it is put most strongly that the lessor had denuded himself of all power and right over the fire-clay by granting this original license. Then His Honour says at the end: "Upon the whole case, therefore, it seems to me that the Defendant is not warranted in disturbing the Plaintiff in the right which he has under his lease and license from the lessor to work the *Stone Coal Seam*, and it seems to me, moreover, that the Defendant in seeking to work the *Stone Coal Seam*, and to work along with it and take and use that fire-clay which the Plaintiff has a right to work under his lease, is doing an unwarrantable thing." The Vice-Chancellor has not gone at great length into the consideration of what according to the construction of the Defendant's lease would pass by it, but contents himself with saying he is of opinion that by reason of the former grant nothing could pass by it.

Mr. *Wickens* cited the case of *Newby* v. *Harrison* (1), in which I was of opinion, and Lord *Campbell*, on appeal, seems to have taken the same view, that where a man had entered into a contract to build ice-houses on the banks of a canal, and the canal company had given him power to take sufficient ice to fill the ice-houses, he might have cause to complain if they granted a subsequent license, leaving him not sufficient to fill his ice-houses, because they knew the purpose of the grant and could not derogate from that grant. In that case it was held, I think, by us both, that the Defendant was a mere trespasser. Here Mr. *Wickens* says it is alleged and proved that if the Defendant continues his works the Plaintiff may not have enough fire-clay left to continue his works, and the lessor knew that the Plaintiff was carrying on a business. I think, however, that it lies on the Plaintiff to prove that the continuance of his works will be interfered with, and, in the next place, I appre-

(1) 1 J. & H. 393; 3 D. F. & J. 287.

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hend that the principle of *Newby* v. *Harrison* (1) is not applicable, because we cannot impute to the lessor knowledge of the extent of the Plaintiff's business. The license cannot reasonably be construed to operate as a grant to the Plaintiff of as much of this particular mineral as he could possibly make use of in the course of his business. What the Plaintiff could raise and get he was to have, but he could not bring trover against the lessor for removing the remainder. Of course the license must have a reasonable intent, the licensee was not to have the whole swept away from him in a body, but he must go on and be content with acquiring in the usual way what he could. It then was urged that the Plaintiff had taken possession of this vein of fire-clay by having struck into it before the Defendant, and that the Defendant could not interfere with that possession. I think it would be a very strong thing to say, regard being had to the fact that this vein seems to run over half the county, and to the evidence as to its being worked in different collieries in other districts, that this vein being struck should put the Plaintiff in immediate possession. But I do not think it necessary to enter into that question, because I do not think the evidence shews the Plaintiff to have commenced working this vein before the Defendant. It appears to me to shew that until after the Defendant had cut through the seam, had dug out and taken samples, and was about to work it, the Plaintiff had done nothing more towards taking possession than clearing out an old pit which had not yet reached this vein. Now, it seems a strong proposition, going beyond any authority cited, to say that a licensee can by *quasi*-nominal possession of that description, exclude the licensor from that power, which all the authorities say he would otherwise have, of taking for his own use articles which he has licensed another to take, which that other has not taken, and as to which that other has not acquired the right.

Regard being had to the whole case, I am of opinion that the bill ought to be dismissed with costs.

SIR C. J. SELWYN, L.J.:—

The Plaintiff's right to the relief which he seeks is founded upon the instrument of the 29th of September, 1854. It is now admitted

(1) 1 J. & H. 393; 3 D. F. & J. 287.

that the license granted by this deed is not an exclusive license, but it is said that the grantor could not after granting the license lawfully do anything in derogation of it, and that, if the licensee had once commenced to work on any particular vein or seam, or even if he had commenced any expenditure with an obvious reference to such working, neither the grantor of the license nor any person claiming under him could afterwards work that vein or seam. The case of *Newby* v. *Harrison* was the only case referred to in support of that proposition. But that case is in my judgment very far from supporting the contention of the Plaintiffs, for the Vice-Chancellor says (1), "What I apprehend the Plaintiff had to establish in the limited view I have taken of the grant, was, first, that there was not sufficient ice left by the Defendant to enable him to fill his ice-houses; and, secondly, that if there had been enough ice left he had the ways and means of carrying it away, and was prepared to do so," and the Lord Chancellor on appeal says in substance the same thing. In my opinion, therefore, that case shews that it is necessary for the Plaintiff to prove that something has been done which is, in fact, in derogation of the previous license. But in the present case there is no evidence to shew that there is not sufficient fire-clay left to the Plaintiff for the purpose of his manufacture.

Assuming, then, that Lord *Rokeby* was authorized to grant the lease of August, 1862, a further question arises upon the construction of that lease, whether the vein or seam in question, viz., the *Stone Coal Seam*, is a workable coal seam within the meaning of that lease? The Lord Justice has already referred to the terms of the lease. It is sufficient to say that it expressly refers to "all the mines, seams, veins, or beds of ironstone and fire-clay found in connection with such coal seams as are workable as coal seams." It is true it is expressed to be "seams workable as coal seams," but when we turn to the reddendum of the deed we find "yielding and paying yearly and every year during the continuance of the said term, in respect of the said coal mines and seams of coal, beds, seams, or veins, or veins of ironstone and fire-clay intended to be hereby demised," a certain fixed rent, and then we find an express royalty of "6*d.* per ton of 22½ cwt. for all

(1) 1 J. & H. p. 398.

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ironstone and fire-clay that shall be wrought or gotten by the said lessee."

I think, therefore, upon the construction of that lease it must be held that the veins or seams of coal there referred to as "workable seams," must be taken to include a vein workable or capable of being worked in connection with fire-clay. This construction of the lease goes far to reconcile the evidence on that which has been termed the question of fact, as to whether this particular seam is or is not a workable seam. On the part of the Defendant it is not only proved that this particular seam is actually worked by him, but that it is also worked at a profit by other persons in neighbouring collieries, and this is not satisfactorily met by any evidence on the other side. If the true construction of the lease is that the words, "workable seams," include a coal seam worked in connection with fire-clay, the conflict of testimony is to a great extent, if not altogether, removed, and the evidence on the part of the Defendant remains without any sufficient or substantial contradiction.

Upon the whole, therefore, I think that the Plaintiff, relying as he does on a mere license without any demise or exclusive license, has not made out any such case as entitles him to an injunction, which is the only relief sought by the bill. Therefore, I agree with my learned brother that the decree of the Vice-Chancellor should be reversed, that the bill should be dismissed with costs, that there should be no costs of the appeal, and that the deposit should be returned.

Solicitors for the Plaintiff: Messrs. *Williamson, Hill, & Williamson.*

Solicitors for the Defendant: Messrs. *Torr, Janeway, & Tagart.*

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L. JJ.
1868
May 8.

Pecuniary and Residuary Legatees—Loss of Assets—Appropriation—Abatement.

A testator, by his will, gave £2300 Bank Annuities to trustees upon trust to pay so much of his debts as his ready money should be insufficient to satisfy, and to hold the residue upon trust to pay the dividends to his wife during her life, and after her death to sell the fund, and also his household furniture, and out of the proceeds, and all other his personal estate, to pay seven legacies amounting to £1075, and to pay the residue to *W. B.* absolutely. The testator died in 1832, and his estate was administered, and the whole of the sum of £2300 Bank Annuities, no part being required for payment of debts, was transferred into the names of the trustees. Both trustees died, and the administrators of the survivor got possession of the fund and misappropriated the greater part of it, so that only £716 was forthcoming. The widow died in 1862:—

Held (reversing the decision of *Malins*, V.C.), that there having been no consent of the legatees to the special appropriation of the fund, the ordinary rule, that the residuary legatee could take nothing till all the pecuniary legatees had been paid, must prevail.

THIS was an appeal from a decision of Vice-Chancellor *Malins*(1).

James Macroft, by his will, dated the 26th of March, 1829, gave to *J. A. Bell* and *J. Osbourn*, whom he appointed his executors, his household goods, plate, linen, china, and other effects, upon trust to let his wife enjoy the same during her life, and he gave and bequeathed to his executors £14 per annum Long Annuities, and £2300 £3½ per Cent. Reduced Annuities then standing in his name, upon trust in the first place, in case his ready money and the dividends and proceeds of his stock thereinafter bequeathed to his wife, subject to the payment of his debts, and funeral and testamentary expenses, and legacies, should be insufficient to pay and discharge the same, to sell out and dispose of so much of the £2300 Bank Annuities, and to sell and dispose of so much of his household goods, furniture, and other effects, as at their discretion, and by the appointment of his said wife, should be sufficient to pay and discharge the remainder of his said debts and expenses, and to pay and discharge the same accordingly, and subject thereto upon trust that they, the said *J. A. Bell* and *J. Osbourn*, or the survivor

(1) Law Rep. 4 Eq. 382.

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of them, his executors or administrators, should stand possessed thereof upon the trusts following (that is to say), in trust to pay the said £14 per annum Long Annuities, and the dividends of the said £2300 Reduced Bank Annuities, unto his said wife or her assigns during her life, and after her death to sell and dispose of the said £14 per annum Long Annuities, and pay and divide the money which should arise from the sale thereof unto and amongst the legatees therein named, and likewise, immediately after the death of his said wife, to sell and dispose of the said £2300 £3½ per Cent. Reduced Bank Annuities, and the said household goods, furniture, and other effects, and stand possessed of the money which should arise from the sale thereof, and of all other his personal estate and effects, in trust thereout to pay seven legacies amounting to £1075, within three months next after the decease of his said wife; and as to all the rest and residue of his moneys and personal estate and effects not thereinbefore bequeathed or disposed of, and after payment of the said several legacies, to stand possessed thereof in trust for *W. M. Baron*, to and for his own use and benefit.

The testator died in February, 1832, and the said *J. A. Bell* and *J. Osbourn* completely administered and wound up the estate of the testator, and set apart the sum of £2300 stock in their names, and no part was or ever had been required for the purpose of discharging the debts of the testator.

J. A. Bell died on the 12th of November, 1856, and *J. Osbourn*, his co-executor and trustee, died intestate on the 22nd of November, 1856, leaving a son, *J. Macroft Osbourn*, who took out letters of administration to his estate and effects.

At the time of the death of *J. Osbourn* the said sum of £2300 stock was standing in the names of *J. A. Bell* and *J. Osbourn*, and the interest, or a sum equal to the interest thereof, was subsequently paid half-yearly by *J. Macroft Osbourn* to the widow of the testator till her death, which took place in March, 1862.

W. M. Baron, the residuary legatee, died in June, 1848, and the Defendants were his legal personal representatives.

On the death of the testator's widow it was discovered that *J. Macroft Osbourn* had sold out the whole of the £2300, and appropriated the proceeds to his own private use.

In consequence of this misappropriation of the moneys, *J. Macroft Osbourn* was, on the 18th of July, 1862, taken into custody and duly committed for trial, and in the following year he was sentenced to three years' penal servitude.

At the time of his apprehension he gave up to the police officer who arrested him the key of a box which he said "contained all with reference to the matter" for which he was apprehended. In this box the sum of £716 in notes and gold was found, and it was admitted by all parties that this sum consisted of moneys received by *J. Macroft Osbourn* out of the proceeds of the sale of the £2300, and that this was all that remained of the said sum. The £716 was thereupon paid into the hands of two solicitors, and was now held by them upon trust for the parties entitled under the will.

The Plaintiffs, who were the pecuniary legatees, or represented such legatees under the will of *J. Macroft*, filed this bill, praying a declaration that the said sum of £716 and interest was applicable in the first place to the payment of the several legacies to which they were entitled under the will in priority to any claim or right of the Defendants as the representatives of the residuary legatee, *W. M. Baron*, and that such sum might be ordered to be paid to them in proportion to the amounts to which they were respectively entitled.

The Defendants, as representing the estate of the residuary legatee, insisted that the sum of £716 and interest ought to be distributed rateably between them and the Plaintiffs according to the respective proportions which the several legacies directed to be paid would have borne to the residue of the sum of £2300 Bank Annuities.

The Vice-Chancellor held that there had been an appropriation of the fund in trust for the pecuniary and residuary legatees, and that the pecuniary legatees must abate proportionably with the residuary legatee. From this decision the Plaintiffs, the pecuniary legatees, appealed.

Mr. *Glasse*, Q.C., and Mr. *Everitt*, for the Appellants:—

The residuary legatee can take nothing but the residue after payment of all the legacies; and it makes no difference whether

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the assets are deficient at the death of the testator or become so by a subsequent *devastavit*: *Ex parte Chadwin* (1); *Fonnereau* v. *Poyntz* (2); *Harley* v. *Moon* (3). The case of *Dyose* v. *Dyose* (4), which is relied on by the other side, has been disapproved of by subsequent Judges.

The Vice-Chancellor based his decision on the idea that this was an appropriated fund. But there was no appropriation by the testator, for he made the fund liable, together with the household furniture and Long Annuities, to the payment of debts and legacies. Nor was there any appropriation by the legatees, whose rights only accrued on the death of the tenant for life: *Wilmott* v. *Jenkins* (5).

Mr. *Cotton*, Q.C., and Mr. *Jason Smith*, for the Defendants, the residuary legatees:—

The case differs from those in which the residuary legatee has been held to take only what remains, because here the fund was appropriated. The debts were all paid without having recourse to the fund, and the estate was completely wound up: *Humphreys* v. *Humphreys* (6); *Page* v. *Leapingwell* (7); *Partington* v. *Carrington* (8).

The case of *Dyose* v. *Dyose* was disapproved of because parol evidence of the intention of the testator was admitted.

Mr. *Horsey*, and Mr. *E. Ford*, appeared for other parties.

SIR W. PAGE WOOD, L.J.:—

This is one of those cases in which the authorities are so numerous that the only difficulty is in the application of them. The principle is well laid down by Vice-Chancellor *Kindersley* in *Harley* v. *Moon* (9). He there says: "If a testatrix has power to dispose of a definite sum—for example, £600—and says, 'I give £100 to *A.*, and £100 to *B.*, and the remaining £400 to *C.*,' of course the sum of £400 is given just as specifically to *C.* as the two sums

(1) 3 Sw. 380.
(2) 1 Bro. C. C. 472.
(3) 1 Dr. & Sm. 623.
(4) 1 P. Wms. 305.
(5) 1 Beav. 401.
(6) 2 Cox, 184.
(7) 18 Ves. 463.
(8) 5 Jur. (N.S.) 1093.
(9) 1 Dr. & Sm. p. 626.

of £100 each are given to *A.* and *B.* If instead of using that language the testatrix says, 'I give £100 each to *A.* and *B.*, and the remainder I give to *C.*,' without specifying the amount of the remainder, the Court has held, in the absence of anything shewing a different intention, that the intention was to give the residue as a specific sum to *C.*, just as specifically as the gifts to *A.* and *B.*"

There are two classes of cases in which a question of this nature arises. First: Where by the terms of the will, after gifts of a specific sum in aliquot portions to certain legatees, the remainder is given to some one else. In that case the donee of the remainder is entitled to an aliquot portion with the others.

Secondly: If all the legatees have consented that they will have the fund out of which their legacies are payable appropriated as a specific sum, it is the same as if the testator had appropriated it; and if any part of the fund is lost, they must all suffer rateably. But unless there is this common consent, we must look to the intention of the testator, and to nothing afterwards.

Now, in the present case, looking at the alleged consent of the legatees, there was no appropriation by them after the death of the tenant for life, and they had no power to change the destination of the fund before her death. Therefore we must look at the will:—[His Lordship then read the bequest set out above.] The executors were to sell all that was necessary of the household furniture and residuary estate for payment of the debts and legacies, and it was not until all that was necessary for that purpose was disposed of that anything was given to the residuary legatee. How can this be compared to *Page* v. *Leapingwell* (1), where a definite fund was ascertained? Here there is no definite fund, nor could there be until the household effects had been sold. Without making any point of the argument that the value of the stock depended on the time of sale, it is clear that there could be no definite sum in a case where both the household effects and the whole of the residuary estate were included in the same gift.

The Vice-Chancellor has relied upon a statement which does not appear in the will, but in one of the allegations of the bill, namely, that, as a matter of fact, the sum of stock and household furniture constituted the whole of the residue, and that no part of

(1) 18 Ves. 463.

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it was needed for payment of debts. But there was no consent on the part of the legatees to treat this fund as the residue, nor was there anything in the will about appropriating this fund as a specific sum; but the testator makes a common fund, and tells the executors to pay the debts and legacies, and gives the uncertain residue to the residuary legatee. This brings the case within the authority of *Harley* v. *Moon* (1). In that case the testatrix had no right to charge the fund with payment of her debts, but she attempted to do it, and thereby shewed that she did not mean to divide it into aliquot shares, as in *Page* v. *Leapingwell* (2). *Dyose* v. *Dyose* (3) cannot be relied on, after the observations which have been made upon it by subsequent Judges, to prove that a residuary legatee can be allowed to come in *pari passu* with other legatees in case of a deficiency of assets.

I may allude to one point which has not been taken in the argument. The residuary legatee might have had costs paid to him out of the estate. If so, he could not have taken them as against the pecuniary legatees, but they would have gone in reduction of the residue. That destroys his aliquot share altogether.

I am therefore of opinion that the Appellants are right in their contention, and that the decree of the Vice-Chancellor must be varied.

SIR C. J. SELWYN, L.J.:—

My opinion agrees with that of my learned brother. The claim of the residuary legatee arises on one clause of the will which is as follows:—[His Lordship read the clause]. It is therefore not merely a residuary gift in the ordinary form, but it is a gift of the residue expressly subject to these legacies. It is, however, open to the residuary legatee to shew that, upon the construction of the whole will, there is to be found an intention on the part of the testator that the effect of the residuary gift standing by itself shall be controlled. But I think that the terms of this will entirely preclude the idea of any such intention. Judging from the words of the testator, so far from giving one specific portion to the residuary legatee, or dividing an ascertained fund into aliquot parts, he could have had no conception what would be the amount of

(1) 1 Dr. & Sm. 623. (2) 18 Ves. 463. (3) 1 P. Wms. 305.

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the fund at the period of division. It is not alleged that anything has been done by the legatees which would bring the case within the authority of *Ex parte Chadwin* (1). The Lord Justice has already disposed of the only remaining question, whether any act has been done by the executors to affect the case, though it is difficult to see how, under the circumstances of this case, any act done by the executors, over which the legatees had no control, to which they were neither called upon to assent or object, and to which, in fact, they could not reasonably or successfully have objected, could have altered the rights of the parties. I agree, therefore, that the order of the Vice-Chancellor must be varied in the manner proposed.

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Solicitors for the Plaintiffs: Messrs. *Duffield & Bruty.*
Solicitors for the Defendants: Messrs. *Drew & Wilkinson.*

Applied. GIBSON *v.* SOUTH AMERICAN STORES (GATH & CHAVES), LTD. [1949] 2 All E.R. 985.

In re SIR ROBERT PEEL'S SCHOOL AT TAMWORTH. *Ex parte* THE CHARITY COMMISSIONERS.

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Charitable Trusts Acts, 1853 *and* 1855—*Private Charity—Power of Revocation —Charity Commissioners—Accounts.*

A testator gave a fund to trustees in trust to apply the income in supporting a school which he had founded; but gave power to the person for the time being entitled, in possession to his devised estates to revoke the trusts, and divert the fund to other purposes. The tenant for life of the devised estates had become the sole trustee. When called upon by the Charity Commissioners to render accounts of the application of the income for two years preceding the application, he refused to render them, alleging that the Commissioners had no jurisdiction, inasmuch as the charity was a private charity, which he had power to discontinue. He did not allege that he had exercised the power of revocation, but stated that he had applied the income for the purposes of the school:—

Held (reversing the decision of *Malins,* V.C.), that assuming the power of revocation to be valid, the fund, until the power was exercised, was devoted to charity, and was an endowment within the *Charitable Trusts Acts,* and that the Commissioners therefore had jurisdiction to call for the accounts.

THIS was a motion by way of appeal from a decision of Vice-Chancellor *Malins,* refusing, with costs, a motion by the Charity

(1) 3 Sw. 380.

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Commissioners to commit Sir *Robert Peel* for non-compliance with a requisition to render accounts of the application of the income of a fund bequeathed for the maintenance of a school.

The first Sir *Robert Peel*, the grandfather of the present Sir *Robert*, by his will directed his executors to invest £6000 in the names of his sons, *Robert Peel* and *William Yates Peel*, and *William Cockburn*, or the survivors or survivor of them, on such securities as therein mentioned, and directed that the trustees should stand possessed of the fund upon trust to receive the income and apply it towards the maintenance and support of a school at *Tamworth*, which had been founded by the testator for the education of male children of poor persons there; and he gave the power of nominating and removing the master to the person or persons, or the majority of the persons, who should for the time being be entitled in possession under his will for life, or for any greater estate, to his estates in *Staffordshire* and *Warwickshire*.

By a codicil the testator directed that the above trusts should be subject to the following directions:—That if his eldest son, *Robert Peel*, or other the person or persons, or a majority of the persons, who for the time being should under the limitations of his will be entitled for life, or for any greater estate, to his *Staffordshire* and *Warwickshire* estates, "shall be dissatisfied with the management, regulations, or discipline of the said school, or shall be of opinion that the said school is not of public utility, or shall for any reason be desirous to alter, vary, and change the management, regulations, objects, and purposes of the said school, then and in any or either of the said cases he, my said son *R. Peel*, or other such person or persons, or the majority of such persons, shall be at liberty either to alter, vary, or change the management, regulations, objects, and purposes of the said school, or to revoke or abolish, and absolutely discontinue and dissolve the same entirely, and thereupon to appropriate, dispose of, and apply the said sum of £6000, and the stocks upon which the same shall then be invested, and the dividends thereof, in such other manner and for such other purposes as he or they shall think fit, either for the purpose of some public charity, or otherwise, without being answerable or accountable unto any person or persons whomsoever, or to any Court, jurisdiction, or authority whatsoever, for so doing;"

but the testator recommended the donees of the power to continue the school as long as they considered it to be beneficial to the people of *Tamworth*, such recommendation not to be construed as imperative.

The present Sir *Robert Peel*, who was living at the death of the testator, had become the sole trustee of the fund, and he was also tenant for life in possession, under the testator's will, of the testator's *Staffordshire* and *Warwickshire* estates, and so the sole donee of the power of revocation. Whether this power of revocation was subsisting was one of the points in question, but the Court gave no opinion upon it.

In 1867 an application was made by the Charity Commissioners, at the instance of certain inhabitants of *Tamworth*, for an account of the application of the income of the charity for the last two years. Sir *R. Peel* replied that this was a private charity, which he had power at any time to discontinue, and for the management of which he was not answerable to the Commissioners. He, therefore, declined to render accounts, but stated that the income had been applied for the purposes of the charity, and that, as a matter of courtesy, he would allow any one whom the Commissioners appointed to inspect and take copies of the accounts at his house in *Whitehall*. The Commissioners declined to accede to this proposal, and Sir *Robert* refusing to render accounts, the Commissioners moved to commit him for contempt of Court, under sect. 14 of the *Charitable Trusts Act*, 1853 (16 & 17 Vict. c. 137).

Vice-Chancellor *Malins* considered that as Sir *R. Peel* was a Member of the House of Commons he could not be committed, and that, moreover, the fund was not so devoted to charity as to give the Commissioners jurisdiction. His Honour accordingly refused the motion with costs. The Commissioners appealed, asking in the alternative for committal or a sequestration. Sir *R. Peel* stated that he claimed to hold the fund adversely to the charity, but it was not alleged that he had ever exercised the power of revoking the trusts; on the contrary, he stated the income to have been regularly applied for the purposes of the school.

Mr. *Jessel*, Q.C., and Mr. *Whitbread*, for the appeal motion:—

We say that the power of revocation is void for remoteness:

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Ferrand v. *Wilson* (1); but that point is of no consequence, for if good it has not been exercised. No real adverse claim is made by Sir *R. Peel* so as to bring him within 16 & 17 Vict. c. 137, s. 15; there is no pretence for one till the charitable trusts are revoked. Till that power is exercised there is a subsisting charitable endowment, and the Commissioners can require the accounts. The statute 16 & 17 Vict. c. 137, constituted the board. The statute 18 & 19 Vict. c. 124, s. 6, gives power to require accounts, and this is a charitable endowment within sect. 66 of the former Act, and sect. 48 of the later Act, and not coming within the exceptions in sect. 62 of the former. Sir *R. Peel* has been guilty of a contempt of Court in refusing the accounts, and under sect. 14 of the former and sect. 9 of the later Act there is no remedy but committal. A new right is given, and the remedy expressly provided for it is the only one that can be resorted to: *Adams* v. *London and Blackwall Railway Company* (2). A member of Parliament may be committed under these sections: *Wellesley's Case* (3); *Lechmere Charlton's Case* (4). The statute 2 & 3 Will. 4, c. 93, expressly exempts a member of Parliament from committal under that Act, which shews that if not so exempted he would have been liable. It is not wished to commit Sir *R. Peel*, but it is most important for a public body like the Commissioners to have it decided what their powers are.

Sir *Roundell Palmer*, Q.C., Mr. *Cotton*, Q.C., and Mr. *Kekewich*, for Sir *R. Peel*:—

This property is not given out and out to charity so as to be within the Acts; the charity is only a sort of tenant at will. The power of revocation cannot at present be void for remoteness, as Sir *R. Peel* was living at the death of the testator; but we say that it is good altogether: *Attorney-General* v. *Masters of Brentwood School* (5); *Christ's Hospital* v. *Grainger* (6); *Walsh* v. *Secretary of State for India* (7). There is no charitable endowment unless there be an out and out dedication to charity: *Morice* v. *Bishop of*

(1) 4 Hare, 344.
(2) 2 Mac. & G. 118, 131.
(3) 2 Russ. & My. 639.
(4) 2 My. & Cr. 316.
(5) 3 B. & Ad. 59; 1 My. & K. 376.
(6) 1 Mac. & G. 460.
(7) 10 H. L. C. 367.

Durham (1); *Ommanney* v. *Butcher* (2); and other cases in *Shelford* on Mortmain (3). The case is one of precatory words, which are not imperative: *Lewin* on Trusts (4); *Malim* v. *Keighley* (5); *Huskisson* v. *Bridge* (6). There can be no committal of a member of Parliament unless the contempt partakes of the nature of a criminal offence, as is shewn in *Wellesley's Case* (7).

Apr. 30. SIR W. PAGE WOOD, L.J.:—

The question raised in this case is one of importance, for it is important to the public that the Charity Commissioners should know what their duties and powers are, and should not be checked in the lawful exercise of them.

In the present case, though the will and codicil creating the charity are a little singular in form, there seems to us no doubt as to their construction. A charity is well created by the will, but subject to discontinuance in a certain manner directed by the codicil, provided that this power of discontinuance is a legal and effective power. We assume, for the purpose of the present decision, that it is so, and that whenever Sir *Robert Peel* is of opinion that the school is not of public utility, or for any reason is desirous of varying, altering, or changing the management, regulations, object, or purposes of the school, then and in any of those cases he is at liberty to vary, alter, or change the management, objects, or purposes of the school, or to revoke the trusts, discontinue the school, and apply the £6000 to other purposes. All I have to say at present is, that he has not done any thing of that kind. Neither he nor his predecessors, in whom this power was vested, have intimated any intention of varying, altering, or changing the regulations and objects of the charity, and therefore there has not occurred the event upon which and upon which alone the power of otherwise dealing with the charity funds would arise.

We have, then, a plain and simple trust of £6000 vested in

(1) 10 Ves. 522.
(2) T. & R. 260.
(3) 1st Ed. p. 83.
(4) 5th Ed. p. 107.
(5) 2 Ves. 529, a.
(6) 4 De G. & Sm. 245.
(7) 2 Russ. & My. 639.

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trustees (not originally including the present Sir *Robert Peel*), upon trust to apply the income, and that only, for the purposes of the school. Therefore, until the course pointed out by the codicil has been taken, there is a charity created for the benefit of the people of *Tamworth*, and it may possibly happen that it never will be altered or changed by virtue of the power contained in the codicil.

The question before us is, whether a charity of that description, subject to alteration or revocation in the manner described in the codicil, is or is not a charity within the meaning of the *Charitable Trusts Act*, and subject to the control of the Charity Commissioners? The *Charitable Trusts Act* speaks of "endowment." A provision made for a charity is none the less an endowment because it may not last throughout all time. A charity is no less a charity within the interpretation clause, sect. 66 of the Act, because its endowment is not perpetual; and I am willing, for this purpose, to read the words of that section, "as to which, or the administration of the revenues or property whereof, the Court of Chancery has or may exercise jurisdiction," as Sir *Roundell Palmer* proposes: viz., as referring only to jurisdiction *quà* charity, and not to jurisdiction exercised over other persons *quà* trustees. Now, supposing Sir *Robert Peel*, as the manager and controller of this charity, were to find it vested in trustees of whom he was not himself one, a position in which he might have found it, though, as it has turned out, he by accident is the sole surviving trustee. Suppose, then, that those trustees had been minded to commit a breach of trust, or had refused to disclose their accounts, would not Sir *Robert Peel* have been justified in saying: "I ask the Charity Commissioners to demand of these gentlemen their accounts?" That is all the Charity Commissioners can do. They can only demand the accounts, and when the accounts are presented they are exposed to public view, and can be seen by anybody interested in the charity. Again, supposing Sir *Robert Peel* not to be one of the trustees, surely any of the parishioners of *Tamworth*, having first applied to him, and been informed that he had not discontinued the trust, might have applied to the Charity Commissioners to call for the accounts of the charity, because so long as Sir *Robert Peel* does not interfere by an exercise of the power, the trustees are clearly liable to account for the fund as a charitable fund in their hands.

Sir *Roundell Palmer* pointed out to us some clauses in the Act, beginning with the 54th, which seemed to give the Charity Commissioners power from time to time to vary any such arrangements of charities as they conceived not to be beneficial; and he contended that a charity to which, owing to a controlling power vested in other persons, these provisions were not applicable, was not a charity within the Act.

If that argument is carried as far as it must for the present purpose be carried, it comes to this, that wherever you find a power in managers of a charity to vary and alter its rules and regulations, the Charity Commissioners have no power to interfere, which would prevent their interference with a very large proportion of the charities in the kingdom.

One argument which was urged, though Sir *Roundell Palmer* said he preferred not to rest his case mainly upon it, was founded on the 62nd clause of the Act, which provides that no donation or bequest to or in trust for any charity, of which no special application or appropriation is directed by the donor or testator, and which may legally be applied by the managing body of the charity as income in aid of voluntary subscriptions, shall be subject to the jurisdiction created by that Act. I do not think that section applicable to such a case as the present; for the testator has directed a special application of the fund until the donee of the power of revocation exercises that power; and until he exercises it, which he has not done, the income of the fund is not applicable to any other purposes than those which he has dictated; nor is the fund itself applicable as income. Supposing the trustees, Sir *R. Peel* not being one of them, had wished to apply the whole of the capital fund as income, they could not, even with the sanction of Sir *Robert Peel* as manager, have lawfully done so, until he had first revoked the existing trust; and then, after having done so, given them authority to apply the whole fund as income.

Sir *Roundell Palmer* further argued that this, according to *Morice* v. *Bishop of Durham* (1), was not a charity. The decision in that case turned upon the fact that the trusts declared were either for charitable objects or for other purposes, so that the Court could not tell how much was intended for charitable objects,

(1) 10 Ves. 522.

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and therefore could not fix the property with charitable purposes at all. That cannot be applied to a case where the testator has definitely marked out the charitable purposes, and has not left it optional with the trustees to apply the fund for the charitable purposes or for other purposes, but has directed them to apply it for the charitable purpose until the managing body of the charity think fit to revoke the trusts.

That being so, the trusts never having been revoked, all that the Charity Commissioners have done has been to require an account for the last two years, during which the income of the fund has been absolutely applicable to the purposes of the school, and to no other purpose whatsoever.

Then it is said that Sir *Robert Peel* sets up an adverse claim, and that, therefore, under the 15th section of the Act, the jurisdiction of the Commissioners is excluded. But a case cannot be considered to be governed by that section merely because the person holding the property says: "I claim to hold this fund adversely to the charity," when all the facts are before the Court, and upon the state of facts it is plain that no adverse claim has ever really been set up, or, if set up, could be established. I take it that when the matter comes to be discussed on a motion made by the Commissioners, it is not only competent to us, but our duty, to inquire whether there really is an adverse claim. I asked the counsel for Sir *R. Peel* whether they claimed anything against the charity during the two years for which the account is sought, and they said they did not, because the money has all gone to the school, and been properly applied. All that the Charity Commissioners ask for is to see the accounts for two years, during which the charity continued, and during that period Sir *R. Peel* had no claim adverse to the appropriation of the income to the charity.

What, then, ought to be done under the 14th section of the Act? Sir *Robert Peel*, having been asked several times to give these accounts, did not give them, but only referred the Commissioners, by way of courtesy, to an opportunity of seeing them at his own house. Of course it would not be proper for persons filling the position which the Charity Commissioners do to accept such an offer, instead of taking the course pointed out by the Act. The Act provides that every person not sending the

accounts required shall be deemed to have been guilty of a contempt of the Court of Chancery, and shall be liable to be attached and committed by the Court on summary application by the Commissioners, and shall pay the costs of and attending such contempt as the Court shall direct. Some discussion has arisen upon the question of privilege—whether Sir *R. Peel*, being a member of Parliament could be committed. That point has not been argued out very fully, and we do not think at present that it ought to be argued out, it being admitted that the object of the present application is not commitment, but to obtain a decision upon the authority of the Commissioners. We give it as our clear opinion that the charity is one within the control of the Commissioners, that the order made by the Commissioners was proper, that the disobedience to that order was improper, and must, under the 14th section, be adjudged a contempt of the High Court of Chancery, and we shall order Sir *Robert Peel* to pay the costs of the motion in the Court below, though there will be no costs of the appeal.

As regards the question whether we should make an order for committal, or for sequestration, which is asked in the alternative, we shall defer the drawing up of the order until we see whether it will be necessary to have it drawn up or not.

SIR C. J. SELWYN, L.J.:—

The questions which have been argued before us may, I think, be conveniently considered under two heads: first, whether the funds in question, the accounts of which for two years have been required, are within the general scope of the two Acts of Parliament to which reference has been made; and, secondly, whether they come within any of the peculiar exceptions contained in those two Acts.

In considering the first of those two questions it is, I think, material to observe, in addition to what the Lord Justice has already said, that these two Acts of Parliament were obviously not intended merely to meet the case where there has been some misappropriation of the charitable fund, but that they have a much wider and more extended object, namely, to enforce publicity with respect to the accounts of all charities coming within the provisions of the Act, whether badly or well administered, and for that reason

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it is provided that for public purposes, as to one copy of the accounts it was to be rendered to the clerk of the peace (and now to the churchwardens), and as to the other copy to be rendered to the Commissioners, in order that the public should have the means of seeing in what manner the charities of the kingdom were being, in point of fact, administered.

Now, bearing that in mind, we come to the argument that the charities intended to be comprised in these Acts of Parliament are, as has been frequently said, only such charities as are permanent and absolute. In the first place, can it be said that it is intended to confine, by this Act of Parliament, the jurisdiction of the Charity Commissioners to cases where, as in the instance of land, the charity is entitled in fee simple to the estate, or, as in the case of personal property, to an absolute indefeasible interest in that property for all time? I think a very cursory consideration of the terms of the Act will suffice to shew that there is no such limitation; for the first Act says that "the expression 'endowment' shall mean and include all lands and real estate whatsoever, of any tenure, and any charge thereon or interest therein, and all stocks, funds, moneys, securities, investments, and personal estate whatsoever, which shall for the time being belong to or be held in trust for any charity;" and then in the second Act of Parliament, in like manner, in the 6th clause, it extends to the "charity, or the property or income thereof." The persons who are called on to account are "persons acting or concerned in the administration of the charity, its property or income, or in the receipt or payment of any moneys thereof." It is, I think, impossible to find anywhere words more uncontrolled or indefinite than those. In my judgment they clearly extend to interests of every description; any interest, for instance, which you might have, in the case of land, for a term of years, or in the case of personalty, supposing the settlor having an interest in a fund which was determinable altogether in the event of the death or the birth of a child of particular parents. That contingency might be more or less improbable; it might have become absolutely impossible; but in either case it appears to me quite clear that it would have been competent to him to settle the fund for a charitable purpose, and that that fund would be an endowment within the meaning of the Act,

although the whole interest would be subject to be defeated by the happening of the contingency to which I have alluded. I think, therefore, unless the case can be brought within the exceptions of the Act, it is clear that this fund of £6000 was a charitable endowment within the meaning of the Act. It is worthy of observation that the very word "endowment" is used with respect to the fund itself in the affidavit of Sir *Robert Peel* himself, for he says: "The school is possessed of no other endowment beyond the fund in question."

I come, then, to consider the second of the two heads to which I have referred, namely, whether this case can be brought within any of the exceptions contained in the two Acts of Parliament. The first, and that which has been urged before us very strongly, is dependent on the 15th section of the first Act, and the proviso at the end of the 6th section of the second Act. The 15th section of the first Act provides that it shall not extend to "any person holding or claiming to hold any property whatsoever adversely to any charity;" and in like manner the proviso at the end of the 6th section in the second Act prevents the Commissioners from requiring information "from any person holding or claiming to hold any property whatsoever adversely to any charity." But putting this case as high as it can be put in favour of Sir *Robert Peel*, and assuming, for the sake of argument, that the power vested in him under the codicil of his grandfather is one which he is capable of exercising to its fullest extent, it amounts to no more than a power to put an end to the charity if he shall think fit to do so, but unless and until that power is exercised the fund remains devoted to charitable purposes, and he claims no adverse interest whatever except the power of putting an end at some future time to the charitable trust.

Now assume that he had actually exercised the power at the very time this dispute arose. Would not the case then be brought exactly to the case which has been put of a fund subject to a contingency? The contingency would then have happened; but up to the time of the happening of the contingency it would be a clear charitable fund, and in fact it is so treated in his own affidavit, where he says the income has been applied for the purposes of the school, and no part of the income has been applied to any

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other purpose. Therefore, I think it is impossible for him to say with respect to the income of this fund (and I think I have already clearly shewn that this Act of Parliament applies to the income), that he who has made such an affidavit can be said to be claiming adversely the income in respect of which alone the accounts are required.

I agree with the argument that it would be a great inconvenience if, on a summary application of this kind, we were to try any question of title, and if Sir *Robert Peel* had put an end to this charity, and the question which we had to determine had been the right which he had to exercise the power, or the mode in which he had exercised it, I confess it appears to me that this would have been an inconvenient time to decide it. But, as I have said, no such question arises, because the accounts which he is asked to render are the accounts of the income during the past two years, during which period he admits that the income has been applied to the purposes of the school. As I have already shewn, independently of any question of the misappropriation of the funds, public policy demands that publicity should be given to those accounts.

I come, then, to the only other exception upon which reliance has been placed, which depends upon the 62nd section of the first Act of Parliament. Sir *Roundell Palmer* has argued in this case that the whole of the fund might have been legally applied by Sir *Robert Peel* as income in aid of the voluntary subscriptions, and I am reminded that he said the whole of the capital might have been so applied. But the answer to that appears to me to be this: that the words of the statute are expressly confined to moneys "of which no special application or appropriation shall be directed or declared by the donor or testator." Here we have a special application and direction, because it is given in trust for the school, and unless and until the power of revocation, assuming it to exist, has been exercised, that application and appropriation so directed and declared remains in full force. I think, therefore, that this exception no more applies than the former to this case.

With reference to another argument of Sir *Roundell Palmer*, I am quite willing to take it as he did, that the jurisdiction of the Court of Chancery means jurisdiction in respect of charity; but, as I have said before, irrespective of any question of misappropria-

tion. But taking that to be so:—Suppose the trustees of this fund during any part of the two years had come to the Court of Chancery to ask for its assistance or advice as to the application of the income during that time, can it be doubted that the power of revocation not having been exercised, the Court of Chancery might have exercised such a jurisdiction? And it is equally clear that the Court could have exercised it in the event of misappropriation of the fund.

I am of opinion, therefore, that Sir *R. Peel* is bound to render the accounts, and I concur in the order which the Lord Justice has proposed.

Solicitors: Messrs. *Fearon & Co.*; Messrs. *Freshfields*.

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Bankruptcy—Order and Disposition—Assignment of Shares in Joint Stock Company—Notice to Company by Assignor.

A shareholder in a joint stock company made an assignment of certain paid-up shares by way of mortgage. The assignee gave no notice to the company. The assignor had also unpaid shares in the same company, and in the course of discussions at the board of directors respecting the unpaid shares the assignor verbally informed the directors of the assignment of his paid-up shares; but no entry was made on the minutes of this notice. The assignor afterwards became bankrupt:—

Held, that inasmuch as the directors received the information in the course of the transaction of the business of the company, the notice was sufficient to make the assignment complete in equity; and that the shares did not remain in the order and disposition of the bankrupt.

THIS was an appeal from a decision of Mr. Commissioner *Winslow*, by which he declared that 400 paid-up shares in the *San Pedro del Monte Silver Mining Company* were in the order and disposition of the bankrupt, *John Randon Worcester*, at the time of his bankruptcy.

The bankrupt was possessed of 400 paid-up shares, and 200 partly paid-up shares in the *San Pedro del Monte Silver Mining Company*, and on the 14th of March, 1866, he deposited certificates of the

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400 paid-up shares, and a transfer thereof, in which the name of the transferee was left in blank, together with the certificates of shares in other companies, with the *Agra and Masterman's Bank, Limited*, to secure the sum of £4000 which was still unpaid. The securities of *Agra and Masterman's Bank* afterwards became vested in the *Agra Bank*.

The transfer of shares was never lodged with the *San Pedro del Monte Mining Company*, and the shares still stood in the bankrupt's name in the books of that company.

On the 26th of August, 1867, *Worcester* was adjudicated bankrupt on his own petition, and a creditors' assignee was subsequently appointed.

The assignee claimed the 400 paid-up shares as being in the order and disposition of the bankrupt with the consent of the true owner, on the ground that no notice had been given to the *San Pedro del Monte Mining Company* of the transfer. It was, however, contended on behalf of the *Agra Bank*, that the directors of the *San Pedro del Monte Mining Company* were affected with notice under the circumstances which were disclosed in the examination of Mr. *Calder*, the chairman of that company.

According to his statement, Mr. *Calder*, having become liable, on behalf of the company, to pay £1000 to the *Imperial Bank*, became very anxious to get in the money due on the unpaid shares. The subject was brought before the board at several successive meetings in or about the month of May, 1867. Among the defaulters *Worcester's* name always appeared, on account of his 200 unpaid shares, and therefore, from fortnight to fortnight, Mr. *Calder* pressed the secretary to get the shareholders to pay up the money, that he might get released from his guarantee of £1000. "It was," he said, "my anxiety to get them to pay up their shares, and therefore I dived into the matter, and of course I found out that the 400 shares were in the *Agra Bank*." He also stated that the information came verbally from *Worcester*, and was openly discussed at the board, although no minute or record was made of it; that although the 200 unpaid shares were not pledged to the *Agra Bank*, it was proposed at the board to apply to that bank to pay the calls on 100 of these shares, in order to "protect" the 400 which they had; but he, Mr. *Calder*, knew that it would be of

no use to apply to them, as the *Agra Bank* had refused to pay upon another lot of shares in the *Washoe Mining Company*, which *Worcester* had deposited with them in like manner. No application was therefore made to the bank on the subject.

Under these circumstances, the Commissioner held that the 400 shares must be held to have been in the order and disposition of the bankrupt at the time of the bankruptcy, with the consent of the *Agra Bank* (1). From this decision the *Agra Bank* appealed.

Mr. *Cotton*, Q.C., and Mr. *Sargood*, for the Appellants :—

The Respondents have to make out two points: first, that these shares were in the order and disposition of *Worcester* at the time of his bankruptcy; secondly, that they were so with the consent of the *Agra Bank*. Unless they establish the first point, the negligence of the *Agra Bank* is immaterial. It is clear from the evidence, that the directors of the mining company, who were in the position of trustees of the shares, had clear notice of the assignment, and it was not necessary that such notice should proceed from the assignees; it was sufficient that it was given by the assignor. If the directors, after that notice, had transferred them, they would have been fixed with a breach of trust. It is true that the notice was not in writing, and that no minute was made of it, but it was a formal notice, given in the course of transacting the business of the company. The shares were there-

(1) The conclusion of His Honour's judgment was as follows:—The directors, it is said, entertained the thought of asking the bank to pay up the calls on the other 200 shares, but no application was ever made to the bank, and there is no evidence to shew that the officers of the bank had the slightest knowledge of the discovery made, if it was made, by the directors of the mining company. There was clearly nothing in the existence of the knowledge thus obtained to lessen the necessity on the part of the bank to give notice to the mining company, or to rebut the inference of consent arising from the absence of notice. The bank does not appear to have been influenced in the slightest degree to abstain from giving notice by any supposition that the directors of the mine were already well acquainted with the circumstances of the deposit, and for aught that the officers of the bank knew, there was the same necessity that exists in every case to make their security as complete as possible by a formal notice. As the absence of notice, when necessary, is evidence of consent, it appears to me the shares must be considered to have been in the order and disposition of the bankrupt at the time of bankruptcy, with the consent of the bank.

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fore removed from the order and disposition of the bankrupt: *Ex parte Richardson* (1); *Ex parte Stewart* (2); *Ex parte Harrison* (3); *North British Insurance Company* v. *Hallett* (4).

Mr. *Druce*, Q.C., and Mr. *Reed*, for the creditors' assignee:—

The shares being *choses in action*, the assignment of them was not complete until the assignees had given notice to the directors of the mining company. It was their duty to do all that was necessary to complete the assignment, and if they neglected to do so, their negligence is a proof of their consent to the shares remaining in the order and disposition of the assignor. It is not sufficient that the directors obtained, casually, knowledge of the fact of the deposit. The directors of a company are a variable body, and unless notice is formally given and recorded in the books, they cannot be expected to remember it. They are not bound to take notice of everything which is stated in conversation at the board: *Ex parte Boulton* (5); *Lloyd* v. *Banks* (6); *In re Brown's Trusts* (7); *Ex parte Monro* (8); *Knowles* v. *Horsfall* (9); *Ex parte Usborne* (10); *Ex parte Burton* (11); *Ex parte Carbis* (12); *Lingard* v. *Messiter* (13); *Ex parte Lancaster Canal Company* (14); *Ex parte Burbridge* (15); *Edwards* v. *Martin* (16). The case of *Ex parte Richardson* is inconsistent with the later authorities.

Sir W. Page Wood, L.J.:—

Unless we are to overrule the case of *Ex parte Richardson*, we think the decision in this case must be in favour of the Appellants. I apprehend the principle of that case to be, that the first question, where there is an assignment of a *chose in action*, is whether the party who owes the debt or duty, as in the present case the directors of the company in which the shares were held, has had distinct and formal notice of the assignment. And if that question is answered

(1) Mont. & Ch. 43.
(2) 34 L. J. (Bkcy.) 6.
(3) 3 Mont. & A. 506.
(4) 7 Jur. (N. S.) 1263.
(5) 1 De G. & J. 163.
(6) Law Rep. 4 Eq. 222.
(7) Ibid. 5 Eq. 88.
(8) Buck. 300.
(9) 5 B. & A. 134.
(10) 1 Gl. & J. 358.
(11) Ibid. 207.
(12) 4 D. & Ch. 354.
(13) 1 B. & C. 308.
(14) 1 D. & Ch. 411.
(15) 1 Deac. 131.
(16) Law Rep. 1 Eq. 121.

in the affirmative, as I think it must be in this case in favour of the Appellants, the only question that remains is, whether it is absolutely necessary that such distinct and formal notice should be given by the person who claims the benefit of the assignment, or whether it is sufficient that notice be in fact acquired independently of any communication with the person claiming the benefit of the assignment, but in such a manner as to fix the person owing the debt or duty with the consequences of acting contrary to the knowledge he has acquired of the equitable interest of the parties.

Take the ordinary case of a trustee of a legacy or a trust fund, who is holding it for *A.* and *B.* before any division is made, and suppose an assignment has been made by one of the parties of his interest, and no notice has been given by the assignee to the trustee of the fund, but suppose the assignor says to the trustee, "I have made over my share in the fund to a third person," could the trustee afterwards, with any safety, dispose of that money adversely to the right of the assignee, and hand it over to the assignor, who had distinctly told him that he had parted with his interest? That would be as distinct a breach of trust as it is possible to conceive, and the trustee would be fixed with the consequences of handing over to the assignor that which he says he has assigned over.

But now suppose that the notice did not come in this direct manner from the assignor, but that the trustee was himself desirous of advancing money to one of the parties interested in the fund, knowing of no previous assignment by either of them, but, inquiring for the purpose of seeing whether any had been made by the person to whom he proposed to make the advance, found, in the course of the inquiry, that the other had assigned his share. I am supposing him to be acting, as a man of business, on his own account, and investigating the whole title to the fund in a deliberate manner for the purpose of acting on the information which, as a man of business, he has acquired—not in a casual manner, as in some of the numerous cases which have been cited, by a person accidentally mentioning a transaction, which might or might not happen to be true,—in such a case I do not think it has ever been held, and it seems to me that it would not be consistent with prin-

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ciple to decide, that a person having such distinct notice of his *cestui que trust* having dealt with the fund could safely hand it over afterwards to him without regard to the notice he had received.

If that be so, let us see what are the exact facts of the case before us, as distinguished from the cases of which so many have been cited:—[His Lordship then referred to the examination of Mr. *Calder*, and continued:—]

Now, let me ask the question, supposing these directors were not acting as trustees at all, but simply held £1000 to the order of Mr. *Worcester*, and the question was whether or not they should deal with any part of that fund, and Mr. *Worcester* had himself come and told them that he had made it over to the *Agra Bank*, and they were to meet and deliberate over and over again on the subject, would it be possible for them safely as individuals to hand it over to any other persons than the *Agra Bank*? There seems to me to be only one answer to this question, and it is conclusive to my mind on the question—whether in an assignment of a *chose in action* it is necessary that notice should be given by the assignee.

There remains, however, one question which is important, especially as it regards some of the later authorities—how far this is applicable to the case of a joint stock company, the directors of which are individuals who, of course, change from time to time, and are not bound to make a record of such a transaction. The notice was not given to them by any person claiming the right to have it recorded, and they were not obliged to enter it on the books. It appears to me that the real and sound distinction is this: The point to be ascertained is, whether or not it is in their capacity of directors, as agents and managers of the company, that the information is acquired, deliberately, formally, and for the very purpose of guiding themselves in their course of action. If it be so, then the case is taken wholly out of that class of authorities which say that the mere circumstance of a matter having been talked of in the board room—the mere circumstance of any one of the directors having personal notice—would have no effect whatever. The cases which decide thus appear to me to have been most justly and righteously decided. Here the communication is a formal intimation given to them

for the purpose of their own business, for the purpose of regulating and guiding their judgment in dealing with the assignor with reference to his 100 shares which were not pledged; and which, in fact, induced them to deal with those shares in a different way than they would otherwise have done. It was a distinct formal matter, a matter acted upon from time to time by the board, who were regulating their own action by the information they had so acquired.

The matter is made more clear if we look at it with reference to the certificates. Assume the case of other directors having been elected before any dealings had taken place with regard to the 400 shares, and that then Mr. *Worcester*, when he came to transfer them, had not been able (as, of course, he would not have been) to produce the certificates; the whole matter would have been brought up again, and the board would have said: "We know why he cannot produce these certificates, because on a former occasion when a question arose as to his 100 shares we ascertained that he had assigned them over."

It appears to me that there was a strict formal assignment of the shares, and that the matter, as far as it goes, is on all fours with the case *Ex parte Richardson* (1). That case seems to me rather weaker than the present in its circumstances, but the principle appears to me to be the same.

There being two points in a case of this kind, namely, first, whether the shares are in the order and disposition of the bankrupt as a matter of fact; and, secondly, if so, whether it is with the consent of the true owners; it is of no avail to cite the case of *Ex parte Stewart* (2) to shew that the assignee not giving notice is evidence of his consent to their remaining in the order and disposition of the bankrupt. That is quite true. If the first proposition had been proved, I should have had no hesitation in holding that the *Agra Bank* were consenting parties; but the first proposition appears to me to fail, by reason of the substantial formal information given to the persons who were responsible for the dealings with the shares. I think, therefore, that the Appellants in this case must succeed, and that the order of the Commissioner must be altered in the way that has been asked.

(1) Mont. & Ch. 43.

(2) 34 L. J. (Bkcy.) 6.

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SIR C. J. SELWYN L.J.:—

In this case the managers of the *Agra Bank* have neglected the precaution of giving formal notice of their interest. The question we have to decide depends, in truth, upon the first of the two points to which the Lord Justice has alluded, which is a question of fact, namely, the question whether the shares in dispute were in the order and disposition of the bankrupt. The cases upon the character and amount of notice and knowledge which is necessary in cases like the present are very numerous, but I think upon examination it will be found that there is no such discrepancy in them as has been suggested in the course of the argument. The case principally relied on by the Appellants, and which is nearest to the present in its circumstances, is *Ex parte Richardson* (1), and Mr. *Druce* says that it is one which cannot stand when considered with reference to the subsequent case of *Ex parte Boulton* (2). Now I observe that the learned Commissioner in referring to the latter case says that it shews distinctly that if shares are left in the bankrupt's name in the register, and no notice is given of a claim, they remain in the reputed ownership and in the order and disposition of the bankrupt unless there is knowledge which renders notice unnecessary. When, however, we look at the judgment of Lord Justice Knight *Bruce* in *Ex parte Boulton,* we find the principle upon which the Lords Justices proceeded very clearly laid down. He says: "The knowledge, the notice which Mr. *Sketchley* had was not knowledge on his part, or notice to him in his character of secretary, or otherwise than in his character of shareholder only, by reason exclusively of his dealing, or attempted dealing, in that character with the merely equitable title to his shares. I think that the directors were not bound by that knowledge or notice, and that they were at full liberty, and had the power, legally, equitably, and safely, at any time between the deposit and the bankruptcy, at any time between the memorandum and the bankruptcy, to permit any transfer by Mr. *Sketchley* of his shares to any person."

I think, therefore, that the present case may be very properly decided with reference to those observations in the case which is most relied upon by the Respondents and by the learned Commissioner. I quite agree with the observation of the Master of the

(1) Mont. & Ch. 43. (2) 1 De G. & J. 163.

Rolls in the case of *North British Insurance Company* v. *Hallett* (1), that "if persons met in society, and over the dinner table, or in casual conversation, an officer of the company heard the fact of the assignment mentioned, this, even though the speaker were the person who made the assignment, would not be sufficient notice;" and that, on the same principle as in the other case to which I alluded in the argument, *Edwards* v. *Martin* (2), casual notice to the secretary will not be sufficient.

In this case, as the Lord Justice has pointed out, the notice was the notice, and the knowledge was the knowledge, given to and acquired by these directors whilst they were transacting the business of the company for the purposes of the business, and with direct reference to the property of the company. And then, after they had acquired the knowledge, to adopt the test applied by Lord Justice *Knight Bruce* in *Ex parte Boulton* (3), suppose the day after the transaction had taken place, and they had knowledge communicated to them under such circumstances, a person had come to them and attempted to dispose of this property, and tried to account by some unfair statement for not producing the certificate, is it possible to say that the directors, having the knowledge they had, would be able legally, equitably, and safely, to permit the dealing with those shares—for that is the test of order and disposition? It seems to me perfectly clear that with the knowledge which the directors then had it would not have been possible for them "legally, equitably, or safely," to permit the transfer of the shares, the certificates of which were in the possession of the equitable mortgagees, and the absence of which could only be accounted for, if at all, by a statement made by the bankrupt, which the directors must have known to be untrue. I therefore agree with the Lord Justice that the decision of the Commissioner in this case should be altered.

Solicitors for the Appellants: Messrs. *Ashurst, Morris, & Co.*
Solicitors for the Respondents: Messrs. *Stocken & Jupp.*

(1) 7 Jur. (N. S.) 1263. (2) Law Rep. 1 Eq. 121.
(3) 1 De G. & J. 163.

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April 17, 18, 26; *July* 4.

HARRINGTON *v.* HARRINGTON.

Heir-looms—Remoteness—Defeasance—Tenant in Tail—Gift over—As far as the Rules of Law permit—Practice—Appeal—Staying Execution.

6 Eq. 527, 531.

A testator gave chattels to trustees in trust for the person and persons who for the time being should, under the limitations of a certain strict settlement, be in the actual possession of certain estates, to the end that the said chattels might be deemed heir-looms to go along and for ever be used with the same estates as far as the rules of law or equity would permit, but so, nevertheless, as that the same chattels should not, as to the effect or purpose of transmission, vest absolutely in any person who, under the settlement, should become seised of the estates for an estate of inheritance, unless such person should attain the age of twenty-one years, or, dying under that age, should leave issue inheritable under the limitations of the settlement. The first tenant in tail in possession under the settlement died without issue before he attained the age of twenty-one years:—

Held, that the estate of the first tenant in tail was thereby terminated, but that there were no words which carried over the chattels in that event to any other tenant for life or tenant in tail, and that the chattels therefore passed by the residuary clause in the will.

Although the words "as far as the rules of law or equity will permit" will not correct a gift which in terms infringes the rule against perpetuity, they may be fairly referred to when a construction warranted by the words used is impugned on the ground of inconsistency with the intention of the testator.

Where the Court has decreed chattels to be delivered up, the execution of the decree will not usually be stayed pending an appeal to the House of Lords.

Affd by H. of L. but subject to variation 5th Feb 87

BY a settlement, dated the 20th of July, 1804, the mansion-house of *Elvaston Hall*, and other hereditaments in the county of *Derby*, and also certain hereditaments in the county of *Chester*, were limited and assured (subject to a certain annuity which had since ceased) to the use of *Charles*, third Earl of *Harrington*, during his life, with remainder, as respects the said hereditaments in the county of *Derby*, to the use of *Charles*, afterwards fourth Earl of *Harrington*, during his life, without impeachment of waste, with remainder to the use of trustees to preserve, with remainder, as respects the said hereditaments in the county of *Chester*, to the use of the said *Charles*, fourth Earl of *Harrington*, during his life, with remainder to trustees to preserve, with remainder to the use of trustees for a term to raise portions, with remainder, as respects

all the said hereditaments, to the use of the first and other sons of the said *Charles*, fourth Earl of *Harrington*, severally and successively in tail male, with remainder to the use of the Honourable *Lincoln Robert Edwin Stanhope* during his life, with remainder to trustees to preserve, with remainder to the use of his first and other sons successively, according to seniority, in tail male, with remainder to the use of *Leicester Fitzgerald Charles Stanhope*, afterwards fifth Earl of *Harrington*, during his life, with remainder to the use of trustees to preserve, with remainder to the use of the first and other sons of the said *Leicester Fitzgerald Charles*, fifth Earl of *Harrington*, severally and successively, according to seniority, in tail male, with remainder to the use of the Honourable *Fitzroy Henry Richard Stanhope* during his life, with remainder to the use of trustees to preserve, with remainder to the use of the first son of the said *Fitzroy Henry Richard Stanhope* in tail male, with divers remainders over in tail male, with an ultimate limitation to the use of the said *Charles*, third Earl of *Harrington*, his heirs and assigns for ever; and the indenture contained a power for tenants for life in possession of the said settled estates to charge the same by way of jointure in favour of their widows to the extent and in manner therein mentioned, and also powers of sale and exchange exercisable as therein mentioned, and also a general joint power of revocation and new appointment exercisable by the said *Charles*, third Earl of *Harrington*, and *Charles*, fourth Earl of *Harrington*.

Charles, third Earl of *Harrington*, by his will, dated the 17th of April, 1824, made the following bequest:—"And I also give and bequeath unto them, my said trustees, their executors and administrators, all my plate, china, glass, pictures, prints, drawings, and books, which shall be in or about my said house, called *Harrington House*, at the time of my decease; and also all my other plate whatsoever and wheresoever, and also all my linen, china, glass, pictures, prints, and drawings, household goods and household furniture, and books, which shall be in and about my mansion-house at *Elvaston*, in the county of *Derby*, at my decease, in trust for the person and persons who for the time being shall, under or by virtue of or under the limitations contained in any settlement of my said mansion-house at *Elvaston*, and the estates in the said

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county of *Derby* settled therewith, be in the actual possession of the same mansion-house and estates: to the end and intent that all and singular such plate, linen, china, glass, pictures, prints, drawings, household goods and household furniture, and books, may be deemed and considered as heir-looms to go along and for ever be used and enjoyed with the same mansion-house and estates (so far as the rules of law or equity will permit), but so nevertheless as that the same chattels personal shall not, as to the effect or purpose of transmission, vest absolutely in any person who, under and by virtue of any settlement, shall or may become seised of, or entitled to, the said mansion-house and estates for an estate of inheritance, either in possession or reversion or otherwise, unless such person shall attain the age of twenty-one years, or, dying under that age, shall leave issue inheritable under the limitations in any settlement thereof." And the testator gave the residue of his personal estate to the same trustees upon trust to convert the same into money, and after payment of his debts and other moneys (all long ago paid) to lay out the surplus in the purchase of real estates to be settled to the same uses as the said mansion-house at *Elvaston* and the other estates.

Charles, third Earl of *Harrington*, the testator and tenant for life of the estates, died in 1829, and was succeeded by *Charles*, the fourth Earl, also tenant for life, who died in 1851 without issue male, and was succeeded by *Leicester*, the fifth Earl, *Lincoln Robert Edwin Stanhope* having died without issue. The fifth Earl, also tenant for life, died in 1862, leaving two daughters and a son, *Seymour Sydney Hyde Stanhope*, surviving him. The son, sixth Earl and first tenant in tail, died in February, 1866, in the twenty-first year of his age without issue, and upon his decease *Charles Wyndham Stanhope*, eldest son of *Fitzroy Henry Richard Stanhope* (who was dead), became seventh Earl and tenant in tail (subject to certain charges) of the estates under the settlement.

Elizabeth William, dowager Countess of *Harrington*, mother of the sixth Earl, filed a bill, as his administratrix, claiming the furniture and chattels so bequeathed by the third Earl as having been the property of the sixth Earl. The seventh Earl filed a cross bill claiming the furniture and chattels under the trusts

declared of them by the will. The furniture and chattels were stated to be upwards of £100,000 in value.

The two suits came on to be heard before the Vice-Chancellor *Malins*, when it was contended on behalf of the Dowager Countess that the divesting clause in the will was void for remoteness, and that the chattels were absolutely vested in the sixth Earl as first tenant in tail in possession. The Vice-Chancellor, however, considered the question concluded by the case of *Christie* v. *Gosling* (1), and decided in favour of the seventh Earl.

The Countess of *Harrington* appealed.

The residuary clause in the will was not set out in either bill, but was referred to in the course of the argument on the appeal—as the whole will was before the Court. It was not in evidence, but was stated at the Bar, that the seventh Earl had executed disentailing deeds of the estates under the settlement.

Mr. *Mellish*, Q.C., Mr. *Jessel*, Q.C., and Mr. *C. Hall*, for the Appellant:—

Mr. *Mellish*:—The gift to the tenant in tail is good, but the limitations over are bad as perpetuities. There are two ways of making personal estate go with real estate. First: by merely saying that it shall do so, the effect of which is that the first tenant in tail takes absolutely; but this again was avoided by saying that no tenant in tail should take unless he attained the age of twenty-one years. Secondly: in order to make it go further, it was provided that the chattels should not vest in any one who did not come into actual possession of the real estate; and it was held in *Christie* v. *Gosling* that though the will might not expressly confine the gift to tenants in tail by purchase, yet it must be so by implication; and that therefore there was no violation of the rule against perpetuities: if, then, that is not the true construction of this will, the ground of that decision fails. The test would be whether if a tenant for life had a son who had a son, it would go to the son or to the grandson. There is a second question, whether you can separate the gift over from the original gift, and the true construction is that it is an absolute gift to the tenant in tail, which is good, with a limitation over in certain events, which is bad,

(1) Law Rep. 1 H. L. 279.

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as a perpetuity: *Egerton* v. *Earl Brownlow* (1). There is no gift except to a person in actual possession, and if he dies under the age of twenty-one, the will says that it is not to stop there, but must go to the next person in possession.

[The LORD CHANCELLOR:—Is there not an intestacy in the event of a tenant in tail in possession dying under twenty-one?]

The testator must mean the property to go over in that event: *Tollemache* v. *Coventry* (2); he says the chattels are to be heir-looms, and go with the estate. As to the effect of the words, "so far as the rules of law will permit," *Lord Scarsdale* v. *Curzon* (3), and *Rowland* v. *Morgan* (4), are authorities. In *Christie* v. *Gosling* (5) the chattels could never go beyond a tenant in tail by purchase: *Potts* v. *Potts* (6).

[The LORD CHANCELLOR:—Is not the result of those decisions, that when you come to the first tenant in tail in possession the transmission must cease?]

Those decisions only mean that the chattels follow the estate until they vest in a tenant in tail, and not then until he attains the age of twenty-one. *Ring* v. *Hardwick* (7), and *In re Johnson's Trusts* (8), are very similar cases. As to the suggestion of an intestacy, the Court could scarcely hold that if the eldest son died under the age of twenty-one, leaving a brother, the chattels would not go to that brother. The difficulties arise from the inherent difference between real estate and personal estate. If the limitations do appear to involve a violation of the rule against perpetuities, that consideration ought not to influence the construction to be put upon the will: *Cattlin* v. *Brown* (9).

Mr. *Jessel*:—The trust for the "person and persons" must mean more than for a tenant in tail alone. The testator does not say that a tenant in tail who dies under twenty-one is not to take, but

(1) 4 H. L. C. 1.
(2) 2 Cl. & F. 611.
(3) 1 J. & H. 40.
(4) 2 Ph. 764.
(5) Law Rep. 1 H. L. 279.
(6) 1 H. L. C. 671.
(7) 2 Beav. 352.
(8) Law Rep. 2 Eq. 716.
(9) 11 Hare, 372.

only that he is not to take so as to transmit to his representatives. There is no rule of law to prevent him from taking. There is in this case no attempt to say that the chattels are to be held upon trusts corresponding with those of the real estate, as in *Marshall* v. *Holloway* (1), and *Hoare* v. *Byng* (2).

Mr. *C. Hall*:—It was never supposed possible to do more than to declare that the property should not vest for the purpose of transmission; anything more is modern, and can hardly be framed so as to be valid. If the property vested in the first taker, the limitations would be valid; but it does not, and there is a clear attempt to create a perpetuity.

Sir *Roundell Palmer*, Q.C., and Mr. *Walford*, for the seventh Earl of *Harrington*:—

We contend that the gift is not too remote. If there was any remoteness, the whole gift would be void. If the fourth Earl died leaving a son who died under the age of twenty-one, why should not the fifth Earl succeed to the chattels? In *Tollemache* v. *Coventry* (3) there were several descents, but it was held to be within the limits. What is the difference between these limitations and those in *Christie* v. *Gosling*? (4) The Appellants must maintain the validity of the gift in order to succeed, and if valid, it is so as to the seventh Earl. There is no rule against limiting chattels to a tenant in tail by descent, and the only object of confining the gift to tenants in tail by purchase is to avoid remoteness; but that may be avoided in many ways. Powers of sale are not void because there may not be for centuries any one who can bar the entail. If there are a series of estates, and provisions as to each for it going over, they will be good as to each which comes within the limits, though they may be bad as to the others. Why is not the seventh Earl to take when the gift to the sixth is divested. The reference to estates in reversion shews that a tenant in tail in reversion who attained twenty-one might take. Suppose that the tenant for life and tenant in tail barred the entail, then there would never be any actual possession, and yet clearly the gift

(1) 2 Sw. 432.
(2) 10 Cl. & F. 508.
(3) 2 Cl. & F. 611.
(4) Law Rep. 1 H. L. 279.

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would not be held to fail. Each person who takes an interest in the real estate will take an interest in the personal estate subject in certain cases to be divested. The words, "so far as the rules of law and equity will permit," must be held to refer to remoteness, and shew that the testator intended to confine his bequest within the limits allowed by law: *Duke of Newcastle* v. *Countess of Lincoln* (1). He has said in substance that he wishes the chattels to go with the land as far as the law will permit, which means that the first tenant in tail who attains the age of twenty-one years is to take them absolutely. As to the effect of the words "actual possession," they do not constitute a condition precedent, and possession is not essential, as the chattels might vest in a person in reversion: *Foley* v. *Burnell* (2); *Duke of Bridgwater* v. *Egerton* (3); for it is clear that a father tenant for life and a son tenant in tail could cut off the entail and acquire the absolute interest. It was said that the "persons" must mean future takers, but that word may refer to daughters who would be tenants in common. If Lord *St. Leonards* is right in *Christie* v. *Gosling* (4), and the whole is void, then the chattels fall into the residue, and so come to the seventh Earl.

Mr. *E. Romilly*, for the trustees of the will.

Mr. *Mellish*, in reply:—

The draftsman seems to have taken the words in this clause partly from one form and partly from another. If the words of the gift are clear, they are not to be controlled by others so as to bring the limitations within the period allowed by law. The seventh Earl is not in the same position as the sixth Earl, who takes under the original gift, whether the limitations over are good or bad: *Egerton* v. *Earl Brownlow* (5). The other Judges in *Christie* v. *Gosling* were of opinion that possession was necessary. You cannot say that if the divesting clause would apply to a case beyond the limits, it would be good if applied to a case within the limits. If it is good, where will it stop?

(1) 3 Ves. 387.
(2) 1 Bro. C. C. 274.
(3) 1 Bro. C. C. 280, n.
(4) Law Rep. 1 H. L. 279.
(5) 4 H. L. C. 1.

April 26. Lord Cairns, L.C.:—

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The question raised in this cause and by this appeal is, whether the chattels bequeathed by the will of the third Earl of *Harrington* vested absolutely in the sixth Earl, and now belong to the Plaintiff in the first suit, *Elizabeth William*, Countess of *Harrington*, as his administratrix, or belong to the Defendant, the seventh Earl.

The Vice-Chancellor *Malins* considered the case to be governed by the decision of *Christie* v. *Gosling* (1) in the House of Lords, and held that the chattels, after being enjoyed by the sixth Earl of *Harrington* during his minority, were divested on his death under twenty-one, and went over and now belong absolutely to the seventh Earl.

In *Christie* v. *Gosling* certain real estate was devised by the will in effect to *Ellis Gosling* for life, with remainder to his first and other sons in tail male, with remainder to the other sons of the testator's brother *Robert in esse* at the testator's death successively for life, and to their first and other sons in tail male, with remainder to after-born sons of *Robert* in tail male, with similar remainders to the testator's brother, *Thomas George*, and his sons. Certain personal estate was then given to be held by trustees upon such trusts and for such estates and interests as were declared concerning the real estate, or as near thereto as the rules of law or equity would admit, with a proviso that the personal estate should not vest absolutely in any tenant in tail unless such person should attain twenty-one. The question in the cause was, *Ellis Gosling* being dead, what was the estate which his eldest son, then under age, took in the personalty. Lord *Westbury*, L.C., when the case came before him (2), read the will as if it repeated, with reference to the personalty, the limitations of the real estate, and treated it as bequeathing the personalty in succession to the various tenants for life, and the various persons named as tenants in tail—the tenants in tail, *ex necessitate*, taking the personalty absolutely, and a succession or shifting among them being introduced by the proviso against vesting in the case of a tenant in tail dying under twenty-one. In other words, the bequest was to certain *personæ*

(1) Law Rep. 1 H. L. 279. (2) 1 D. J. & S. 1.

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designatæ, who, as to the real estate, were some of them tenants for life and some of them tenants in tail, and all within the limits of perpetuity, and who were to take the personal estate in succession, the tenants for life for their lives, and the tenants in tail absolutely. The succession, when once the personalty came to a tenant in tail, was produced by the divesting clause which, terminating the estate of a tenant in tail dying under twenty-one, left the clause of bequest to operate in favour of the next person named. Lord *Westbury*, on this principle, declared that the personalty was vested in the Plaintiff, the eldest son of *Ellis Gosling*, liable to be divested in the event of his dying under twenty-one; and I read this decision of the Lord Chancellor as declaring, not merely that the bequest of the personalty was valid up to and including the estate of the eldest son of *Ellis*, but also that on his death under twenty-one it would, on the principle I have stated, go over to the next person named in the will as tenant for life or tenant in tail, as the case might be.

In the House of Lords the decision of the Lord Chancellor was confirmed. It is true that the opinions expressed by Lord *Chelmsford* and Lord *Cranworth*, who formed the majority, do not in terms do more than affirm the validity of the bequest up to and including the estate of the son of *Ellis*, the first tenant in tail. But I cannot think that those noble and learned lords did not also concur in the opinion of Lord *Westbury* as to the efficacy of the gift over on the death under twenty-one of the son of *Ellis*.

In the present case the limitations of the real estate, which are not contained in the will, but in a settlement to which the will refers, are in effect to the fourth Earl for life, remainder to his first and other sons in tail male, remainder to the fifth Earl for life, remainder to his first and other sons in tail male, remainder to the father of the present or seventh Earl for life, remainder to his first and other sons in tail male.

A number of persons are thus named or described as the persons to take the real estate successively for life and in tail male, and if the personalty had been bequeathed to these persons by reference, the case would have been the same as *Christie* v. *Gosling* (1). The will, however, declares that the chattels shall be held by the trus-

(1) Law Rep. 1 H. L. 279.

tees upon the following trusts:—[His Lordship read them, and also the residuary bequest.]

The chattels are, therefore, in the first instance bequeathed, not to persons who are named, or who on the death of the testator can be ascertained as *personæ designatæ* by reference to the limitations of the real estate, as was the case in *Christie* v. *Gosling* (1), but to a class of persons who are to be ascertained by future events, namely, by the fact of their coming by virtue of the limitations of the real estate into actual possession of it, and these persons are to take the chattels as heir-looms, that is, in succession, and the chattels are to go along with the real estate as long as the rules of law and equity will permit—a conjoined devolution of realty and personalty which, as is well known, the rules of law and equity will permit to be maintained only until the personalty reaches a tenant in tail in whom the personalty will become an absolute interest.

In the events which happened, the actual possession of the real estate fell out thus:—It went to the fourth Earl for life, to the fifth Earl for life, and to the sixth Earl as tenant in tail; I therefore read the bequest of the chattels as enuring to the fourth Earl for life, to the fifth Earl for life, to the sixth Earl absolutely.

But then come the words of negation qualifying this bequest, and providing that the chattels shall not vest for transmission in a person taking the real estate for an estate of inheritance, and dying under twenty-one without issue. I cannot read this otherwise than as terminating the interest of the sixth Earl in the chattels on his dying under twenty-one. But neither can I find in this or in the previous part of the sentence, any words which carry over the chattels in that event to any other tenant for life or tenant in tail. The words of gift do not, in my opinion, go beyond the first tenant in tail who gains possession, and they do not, as in *Christie* v. *Gosling*, comprise any other tenants in tail. The words commencing "but so, nevertheless," are words of negation and defeasance only, and do not extend the words of gift. The result is that on the death of the sixth Earl under twenty-one the chattels become subject to the trusts of the residuary estate of the third Earl, being otherwise undisposed of.

It was contended for the Countess of *Harrington*, who seeks to

(1) Law Rep. 1 H. L. 279.

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make this clause of defeasance or negation operate in construction as a bequest shifting the chattels from tenant in tail to tenant in tail until some one attains twenty-one, and therefore void as being obnoxious to the rule against perpetuity, that any other construction must defeat the intention of the testator, which must be taken to have been to join together the real estate and personal estate. But it is to be observed that the declared intention of the testator is not to join the chattels to the real estate absolutely, but only so far as the rules of law and equity will permit, and although these words will not correct a gift which in terms infringes the rule against perpetuity, they may be fairly referred to when a construction warranted by the words used is impugned on the score of inconsistency with the intention of the testator. It is also worthy of notice that the clause would be, even on the construction of the Appellant, singularly ineffective for keeping the estates together, for a tenant in tail might die under twenty-one leaving a widow and son and a daughter, and two-thirds of the chattels would not, even on the Appellant's view, go to the son, but would fall as on an intestacy to the widow and daughter.

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I concur, therefore, with the Vice-Chancellor in thinking that the Countess of *Harrington*, the Plaintiff in the first suit, has failed in making out her case, and I think that her bill was rightly dismissed, and the appeal, so far as it complains of the dismissal, must be also dismissed. I am unable, however, to hold as the Vice-Chancellor has done, that the chattels passed to the present Earl under the clause in the will which I have termed the clause of negation or defeasance. I think that the chattels, on the death of the sixth Earl under twenty-one, became part of the residuary estate of the testator, the third Earl, and that the title of the present Earl to the chattels is to be maintained through his title to that residue. His title under the residuary gift is not at present set out in his bill, which there should, in my opinion, be leave to amend in this respect, making the representatives of the third Earl parties, and stating also the disentailing deeds, which I understand Lord *Harrington* has executed or will execute. The decree, when the record is thus perfected, will declare that on the death under twenty-one of the sixth Earl, the chattels and personal estate became subject to the trusts declared by the will of the third Earl

of his residuary personal estate, under which trusts the present Earl of *Harrington* would be tenant in tail male of the lands thereby directed to be purchased, and, it appearing that the Earl of *Harrington* has by a deed, &c., dated, &c., and duly enrolled, &c., barred the entail in such lands and personal estate, and acquired the absolute interest therein, declare that he is now absolutely entitled. The representatives and trustees of the third Earl will, I assume, admit that the chattels represent clear residue of their testator's estate available for investment.

I do not propose to interfere with the decree as to the costs of the suits up to and including the decree of the Vice-Chancellor. But as I propose, subject to anything I may hear from the counsel of Lady *Harrington*, that the suit of the Earl should be made available for obtaining a declaration of his title as between himself, the trustees, and Lady *Harrington*, and as the difficulty in the title arises on a will under which both the sixth and seventh Earls must claim, I think the costs of all parties of the appeal should be provided for out of the estate.

July 4. A motion was now made, by special leave, on behalf of the Dowager Countess of *Harrington*, that a certain part of the chattels, consisting of furniture, pictures, &c., at *Harrington House, Kensington*, her own residence, might be allowed to remain there until a Petition of appeal, which had been presented by her against the decree, was heard and decided.

Mr. *Jessel*, and Mr. *C. Hall*, in support of the application, said that these articles had never been at *Elvaston*, and that their removal would dismantle *Harrington House*. There was no suggestion that they would not be perfectly safe there; and though they would no doubt be quite safe in the custody of the Earl, still the rules of the Court ought not to depend upon personal considerations: *Barrs* v. *Fewkes* (1).

Sir *Roundell Palmer*, and Mr. *Walford*, for the Earl of *Harrington*, said that he was willing to give an undertaking not to sell or injure the articles in question.

Mr. *E. Romilly*, for the trustees.

(1) Law Rep. 1 Eq. 392.

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LORD CAIRNS, L.C., said that if he allowed the Countess to retain the enjoyment of these articles, he should be acting in contravention of all the principles of the Court upon the subject. This was not like the case of money, which might be spent, and the utmost that the Court had done in such cases was to take care that the property should be kept in such a shape as that, in the event of the decision being reversed by a superior tribunal, it might be restored, and as the Earl of *Harrington* was willing to give such an undertaking, this application must be dismissed with costs.

Solicitors for the Countess of *Harrington*: Messrs. *Gregory, Rowcliffe, & Rawle.*

Solicitor for the Earl of *Harrington*: Mr. *H. H. Walford.*

Solicitors for the Trustees: Messrs. *Wing & Ducane.*

L. C. 1868 June 4

PEASE *v.* JACKSON.

Mortgage by Benefit Building Society—6 & 7 Will. 4, c. 32, s. 5—Second Mortgage—Priority—Tacking.

A member of a building society having made a mortgage to the trustees of the society and a subsequent equitable charge in favour of the Plaintiffs, requested the Defendants to pay off the first mortgage. This was done, and the receipt of the trustees was indorsed upon the first mortgage and the title deeds handed over to the Defendants, and the mortgagor at the same time executed a mortgage of the property to the Defendants, who had no notice of the Plaintiffs' charge:—

Held (reversing the decision of the Master of the Rolls), first, that the Defendants had the better equity, and therefore that the rule, "*Qui prior est tempore, potior est jure*" did not apply. Secondly, that on the satisfaction of the first mortgage the legal estate in the property was vested, by virtue of the 5th section of the 6 & 7 Will. 4, c. 32, either in the original mortgagor or in the parties who had the best right to call for it; in either of which cases it had passed to the Defendants.

The Defendants at the time of paying off the first mortgage made a further advance, which was included in the mortgage to them:—

Held, that they were not entitled to tack this.

THIS was an appeal from a decision of the Master of the Rolls.

The *Middlesborough Benefit Building Society* was established

under the 6 & 7 Will. 4, c. 32. On the 12th of May, 1856, *Thomas Hood*, a member of the society, being entitled to an advance according to the rules, executed a mortgage of certain freehold hereditaments to the trustees of the society for securing the payment of £300, being subscriptions and other moneys due from him to the society in respect of his shares.

On the 20th of August, 1857, *Hood*, being indebted to the Plaintiffs, *J. Pease* and *J. Sharp*, in the sum of £200, gave them a bond for that amount, and executed an agreement for a mortgage of the same hereditaments. This agreement contained an express reference to the previous mortgage. On the 20th of September, 1859, notice of the second mortgage was given to the secretary of the *Middlesborough Building Society*.

In 1860, *Hood* became a member of the *Leeds Benefit Building Society*, and applied to them for an advance for the purpose of paying off the mortgage of the *Middlesborough Building Society*, as he found that he could borrow the money from the *Leeds Society* on better terms.

By the 12th rule of the *Middlesborough Building Society* it was provided, that if any member who had received an advance on his shares should be desirous of paying and satisfying his security, the trustees should award to such member his proportion of the profits and the amount of subscriptions which he had paid, and should receive the balance either in one payment or by instalments, and on payment of the balance, together with all fines due in respect of his shares, the trustees should deliver all deeds and documents in their custody relating to the security to the member at his cost, and indorse a receipt or acknowledgment on such mortgage deed, according to the 6 & 7 Will. 4, c. 32, s. 5, and the receipt of the said trustees should be a sufficient discharge.

By the 6 & 7 Will. 4, c. 32, s. 5, it was enacted that it should be lawful for the trustees of any benefit society to "indorse upon any mortgage or further charge given by any member of such society to the trustees thereof for moneys advanced by such society to any member thereof, a receipt for all moneys intended to be secured by such mortgage or further charge, which shall be sufficient to vacate the same, and vest the estate of and in the property comprised in such security in the person or persons for the time being

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entitled to the equity of redemption, without it being necessary for the trustees of any such society to give any re-conveyance of the property so mortgaged."

On the 3rd of July, 1860, the agent of the *Leeds Society* paid the sum of £223 1*s.* 5*d.*, which then remained due from *Hood*, to the trustees of the *Middlesborough Society*, *Hood* being present at the time of payment, and the trustees of the *Middlesborough Society* signed a receipt which had been indorsed upon the back of the mortgage of the 12th of May, 1856, for the sum of £300, in discharge of all moneys intended to be secured by that mortgage. At the same time *Hood* executed a mortgage of the same property to the trustees of the *Leeds Society* to secure the repayment of £230 4*s.* 5*d.* The mortgage deed was dated the 4th of July, but was in reality executed at the same time as the receipt indorsed upon the original mortgage. The difference between the sum actually paid and the sum secured represented certain subscriptions payable by *Hood* to the *Leeds Society*. The original mortgage deed and the other title deeds of the property were then given up to the trustees of the *Leeds Society*, who denied all notice of the Plaintiffs' incumbrance. *Hood* disclaimed all interest in the equity of redemption, and was not made a party to the suit.

The Plaintiffs, in their bill, claimed priority for their mortgage over the mortgage of the 4th of July, 1860, and prayed for payment of the debt, or foreclosure. Some evidence was given of a conversation between *Hood* and the Plaintiff *Sharp* on the subject of paying off the first mortgage, the effect of which was, however, controverted.

The Master of the Rolls was of opinion that the original mortgage had become vacated, and that the mortgage to the trustees of the *Leeds Society* was an entirely new mortgage, and must be postponed to the Plaintiffs' security. He therefore granted the relief prayed. The Defendants appealed from this decision (1).

(1) The principal portions of the judgment of Lord *Romilly*, M.R., were as follows. After stating the facts of the case, his Lordship said:—

I am of opinion that the Plaintiffs have priority over the *Leeds Society*. There was no transfer of the mortgage from the *Middlesborough Society* to the *Leeds Society*; the mortgage to the former was paid off, and there was a new mort-

Mr. *Jessel*, Q.C., and Mr. *J. T. Humphry*, for the Appellants:—

The Defendants having paid off the mortgage of the *Middlesborough Building Society*, and obtained possession of the title deeds, had the first equity, and the right to call for the legal

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gage created to the *Leeds Society*. It is true it was all one transaction; the money was advanced for the purpose of paying off the *Middlesborough Society*, and the mortgagor executed the mortgage to the *Leeds Society* at the same time that the trustee of the *Middlesborough Society* gave the receipt, and they were handed over contemporaneously; but the first mortgage was at an end, and another was created, and the question is whether the first mortgage was kept on foot by the fact of the *Leeds Society* simply getting the title deeds.

It was contended by Mr. *Humphry* that if a person obtains the title deeds which shew where the legal estate is, he thereupon becomes entitled to claim the legal estate. But I am of opinion that that is not settled by the cases of *Willoughby* v. *Willoughby* (1 T. R. 763), *Maundrell* v. *Maundrell* (10 Ves. 246), and *Stanhope* v. *Earl Verney* (2 Ed. 81), which only shew that where, in the judgment of the Court, a person has a deed creating a term, and there is a declaration of trust, the term is to be held for the benefit of the person who has possession of the deed, and that he is entitled to the legal estate. But here those cases do not apply, for there is no term at all, and the legal estate is outstanding, and the question is, who has the best right to call for it?

I am of opinion that the rule adopted by Lord *Hardwicke* in *Willoughby* v. *Willoughby* (1 T. R. 763), "*Qui prior est tempore, potior est jure*," applies to this case. The principle of tacking does not apply at all. The principle of tacking is simply this, that where two innocent parties advance their money, and the legal estate is in the hands of a person who has a claim upon the property in respect of money advanced by him, the person who pays him off, and obtains a transfer of his mortgage, tacks a subsequent advance which was made in ignorance that the other party had granted a mortgage on the property. In fact, it amounts to nothing more than this, that where there is a first mortgage on property, and a second mortgage is made by the mortgagor of which no notice is given to the first mortgagee, and the first mortgagee *bonâ fide* advances money in ignorance that there is a second mortgage, he is entitled to be paid off both his mortgages in priority to the second mortgagee. But where, as in *Prosser* v. *Rice* (28 Beav. 68), there are two equitable mortgagees, and the legal estate is outstanding in a person who is merely trustee for the person entitled, then the person who has the first charge on the property is entitled, and the mere fact of a subsequent mortgagee getting in the legal estate would not entitle him to oust the person having such first charge.

That is how the present case would stand if no question arose on the statute of 6 & 7 Will. 4, c. 32. In the case of *Prosser* v. *Rice* (28 Beav. 68) I was of opinion that the statute did not vest the legal estate, or operate to transfer the mortgage, to the person who paid off the building society, who were first mortgagees. I have reconsidered that case, and think that I

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estate: *Rice* v. *Rice* (1); *Maundrell* v. *Maundrell* (2); *Wilkes* v. *Bodington* (3); *Stanhope* v. *Earl Verney* (4); *Ex parte Knott* (5). They were, therefore, the persons entitled to the equity of redemption within the meaning of the statute (6 & 7 Will. 4, c. 32, s. 5), and the legal estate became vested in them under that section upon the receipt for the mortgage money being signed: *Stamers* v. *Preston* (6).

The case of *Prosser* v. *Rice* (7), relied on by the other side, is distinguishable, inasmuch as the mortgage to the persons paying off the building society was subsequent to the payment; in the present case it was all one transaction.

If the meaning of the statute is, that the legal estate vests in the mortgagor upon the signing of the receipt, the Defendants have still the best title, as they took their mortgage from him without notice of the second mortgage. Having the first mortgage and the legal estate, we claim to tack the small additional sum advanced at the same time to our mortgage.

Mr. *G. N. Colt* (Mr. *Southgate*, Q.C., with him), for the Plaintiffs:—

This case is governed by *Prosser* v. *Rice*, in which the facts were very similar and the principle the same. The main question is, whether the advance by the Defendants was a new debt. We contend that it was, and that the first mortgage was discharged by the payment to the *Middlesborough Society* and the receipt by the trustees. The Defendants made no attempt to keep the first mortgage on foot. They allowed the mortgagor to pay off the mortgage and take the receipt from the trustees. The consequence of which was that under the section referred to the mortgage was "vacated," and the estate vested in the Plaintiffs, who were "entitled to the equity of redemption." They were pur-

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came to a right conclusion. It does not appear to have been appealed, and I am disposed to follow it on the present occasion. The consequence is that the Plaintiffs are entitled to the usual decree of foreclosure, the costs of the suit to be added to their mortgage.

(1) 2 Drew. 73.
(2) 10 Ves. 246.
(3) 2 Vern. 599.
(4) 2 Ed. 81.
(5) 11 Ves. 609.
(6) 9 Ir. C. L. Rep. 351.
(7) 28 Beav. 68.

chasers *pro tanto* of the mortgagee's interest; and on the first mortgage being paid off the Plaintiffs' mortgage became the first charge. The rules of the society did not contemplate, and were inconsistent with, a mortgage being transferred to a stranger. It was intended that it should be paid off by the subscriptions of the member.

Mr. *J. T. Humphry*, in reply.

LORD CAIRNS, L.C. :—

It will be convenient in this case to consider in the first place what is the exact position of the Plaintiffs and of the trustees of the *Leeds Benefit Society*, supposing neither of them have any legal estate. In that case their position would be this. The trustees of the *Leeds Benefit Society*, up to the time when they advanced their money, had no notice whatever of the Plaintiffs' charge. On the other hand the Plaintiffs, by their charge, had distinct notice that it was not a first charge upon the property of *Hood*, the mortgagor, but that it was subject to a prior charge to the *Middlesborough Benefit Society*, and that the *Middlesborough* charge must be got rid of before they could stand as the first incumbrancers on the property. In the next place, the *Leeds Benefit Society*, as regards the larger part of the money which they advance, advanced it clearly and distinctly by way of paying off the charge due to the *Middlesborough Benefit Society*, and for the express purpose of paying off that charge, and it is impossible not to see—from the careful way in which the payment was made, from the anxiety with which the money was made to pass direct from the trustees of the *Leeds Society* to the trustees of the *Middlesborough Society*—that the object and the intention of the *Leeds Benefit Society* was to stand as the first incumbrancers upon the property. Further than that, the *Leeds Benefit Society* have got this conspicuous advantage, they stipulated for and obtained the possession of the title deeds of the property. Now in that state of things, and without adverting at present to the conversation which is in controversy between Mr. *Sharp* and Mr. *Hood*, simply taking those facts which I have already stated, and which are undisputed, it appears to me that if there were no legal estate in the case to alter the relations of the

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parties as between the Plaintiffs and the *Leeds Benefit Society*—although the Plaintiffs may technically be first in point of time—the better equity is distinctly with the *Leeds Benefit Society*, and the rule, therefore, which gives the preference to the first in time as between two equal equities, could not apply, the equities not being equal.

Up to this point it would stand thus, that the Defendants having the title deeds, and having a better equity, they could not, as Defendants in a suit in equity, be made to give up anything which they have possession of, either the title deeds or any other advantage. Then it is said that a legal estate has intervened which makes a difference, and for that purpose the Act was referred to of the 6 & 7 Will. 4, c. 32, s. 5. There is an obscurity no doubt with regard to the construction of that section, but it appears to me that it must mean one of two things, and for the present purpose it does not matter which is the construction adopted. 14 Ch D 144 One construction might be, that if the mortgagor comes to the building society and pays off the mortgage money, and a receipt is indorsed stating that he, in one sense certainly the owner of the equity of redemption, has paid off the mortgage money, thereupon, without it being necessary for the trustees to give him on that payment a reconveyance of the property mortgaged, the property shall 14 Ch D 146 vest in him. Another construction might be this, that no matter who pays off the mortgage money, the receipt indorsed is to operate so that the legal estate in the mortgaged premises is to go at large to whichever of all the persons entitled in any shape or form to the equity of redemption has the best equity to call for the legal estate—a very difficult problem indeed to be solved, and not a very convenient way for the Act of Parliament to have provided for the disposition of the legal estate—a disposition which very often could not be exactly determined except through the medium of a Chancery suit. But one or other of these constructions appears to me clearly to be the right one, for I think certainly it cannot be the right construction to hold that if, as in this case, the mortgagor pays off the mortgage money and the receipt is indorsed, the legal estate is *ipso facto* to vest in the next equitable incumbrancer in point of time, without regard to the question whether he has the best right to call for the legal estate.

Now whichever of those constructions is applied, the result as regards the case of the Appellants will be the same; because if it be taken that the legal estate reverted to *Hood*, as the original owner of the equity of redemption, then, according to the view which I take of the case, the Defendants, the trustees of the *Leeds Benefit Society*, had the best right to take it from him: or if, on the other hand, the legal estate ought to be held to have passed from the *Middlesborough Benefit Society* to whichever subsequent incumbrancer had the best right to call for the legal estate, then, on the same principle, in my opinion, the trustees of the *Leeds Benefit Society* would be that incumbrancer. In either case, therefore, the Plaintiffs would not derive any benefit from the legal estate.

I think it better to rest the decision upon the ground which I have stated, without going into what I have called the controverted question as to the conversation between *Sharp* and *Hood*, for two reasons; first, because it is controverted; and, secondly, because whatever passed in conversation between *Hood* and *Sharp*, there is no allegation that it was ever communicated in any way to any person on behalf of the *Leeds Benefit Society*. But, certainly, I think, taking *Sharp's* own statement, it confirms the view which I have taken of the equity of this case; for it shews that the substance and truth of this transaction was, that the *Leeds Benefit Society* was doing nothing more than paying off the *Middlesborough Society* for the purpose of standing in their place.

I think, therefore, with great deference to the Master of the Rolls, that the decree which he made must be varied, and it depends on whether the Plaintiffs are prepared to redeem what the form of the decree shall be. If they decline to redeem, of course the bill must be dismissed; on the other hand, if they prefer it, they may have an option to redeem within the usual time, and in default of redeeming within the usual time a peremptory order dismissing the bill. The Defendants will, however, only be entitled to be redeemed for the amount advanced by them to the *Middlesborough Society*; as to any charge beyond that the *Leeds Society* will be incumbrancers *puisne* to the Plaintiffs, and there will be an ultimate decree of foreclosure against them for that amount. I have not hitherto said anything as to the amount

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for this reason. It seems to me perfectly clear upon the principle upon which I have decided the case, namely, that of the better equity, that I cannot do more than look at the sum by the payment of which the *Leeds Society* became in substance the transferees from the *Middlesborough Society*. It was the circumstances attending that payment which gave them the better title to call for the legal estate, or say it is in them; but I do not agree with the argument of the Defendants, that having accomplished that end, they are then in as good a position as if they had got originally the legal estate by contract, and were then entitled to tack to it the subsequent advance.

Solicitors for the Plaintiffs: Messrs. *Walker & Jerwood.*

Solicitors for the Defendants: Messrs. *Torr, Janeway, & Tagart,* agents for Messrs. *Middleton & Son, Leeds.*

L. C. 1868 *June* 24.

KERMODE *v.* MACDONALD.

Will—Codicil—Specific Legacy—Charge on Real Estate—Revocation.

A testatrix, by her will, gave to *A.* for life the interest of £300, or thereabouts, invested by her in the *General Steam Navigation Company*, and the interest of £200; and after *A.'s* death she gave the "said principal sum of £500" to *A.'s* children; and she directed that in case of her personal estate proving insufficient for the payment of her legacies such deficiency should be made up out of her real estate by sale or mortgage. By a codicil, she gave "all her personal estate" to *B.*:—

Held, that the whole personal estate passed by the codicil; that the legacy of £300 was specific, and was revoked by the codicil, and that the legacy of £200 was not revoked, but remained charged on the real estate.

Decree of the Master of the Rolls affirmed.

LOUISA THOMAS, by her will, dated the 28th day of July, 1832, devised certain real estates in *Wales* to *Maria Macdonald* and *Sophia Anderson* for their lives, with remainders over, so that the estates devised to *Maria Macdonald* for life were now vested in *Alexander Macdonald* and *A. C. Macdonald*, and bequeathed (among other legacies) to *Mary Griffith* the interest, profits, or produce of the sum of £300 British, or thereabouts, invested by

the testatrix in the *General Steam Navigation Company, London,* and also the interest of £200 British for her life, and upon her decease the testatrix desired that "the said principal sum of £500" should be equally divided amongst the children of *Mary Griffith;* and she directed that in case of her personal estate proving insufficient for the payment of the legacies thereinbefore mentioned, then such deficiency should be made up from and out of her real estates in *Wales* by sale or mortgage; and she bequeathed the residue of her personal estate to *S. Gelling* and *Ann Thomas.*

On the 11th of September, 1858, the testatrix made a codicil in these words:—"This is a codicil to my last will and testament, bearing date the day of , 18 , and I direct it may be taken as part thereof. I give, devise, and bequeath, unto *A. C. Macdonald* all my personal estate, and I hereby appoint *A. C. Macdonald* sole executrix of this codicil to my will.

The testatrix died in 1859.

Mary Griffith married and died in the lifetime of the testatrix, leaving one child, *W. J. Kermode,* the Plaintiff in this suit, who claimed the two above-mentioned legacies, either out of the personal estate or out of the real estate in *Wales.*

The Defendants, *A. C. Macdonald* and the other devisees of the real estate in *Wales,* insisted that all the legacies given by the will were, in fact, revoked by the codicil; and that by reason and in consequence of such revocation, the charge of the legacies on the real estate in aid of the personal estate had become inoperative.

The Master of the Rolls, before whom the suit was heard, held that the £300 legacy was revoked by the codicil, but that the £200 legacy remained charged on the real estate, as reported (1).

A. C. Macdonald and *Alexander Macdonald,* appealed.

Mr. *Osborne,* Q.C., and Mr. *Shebbeare,* for the Appellants:—

A will and codicil are not to be construed like a will, as it is the duty of the Court to reconcile the different parts of a will if possible, but a codicil always is taken to destroy a part of the will. This will and codicil cannot stand together, and the codicil entirely revokes all the gifts of personal estate contained in the

(1) Law Rep. 1 Eq. 457.

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will. All the dispositions of the personal estate are destroyed by the codicil, and the dispositions in aid fall with them. The testatrix, by her will, gave part of her personal estate in legacies and part as residue, and why should any distinction be made in the effect of the codicil on the two parts? *Le Grice* v. *Finch* (1) is not applicable, and the law is laid down by *Buckeridge* v. *Ingram* (2); *Brudenell* v. *Boughton* (3); *Sheddon* v. *Goodrich* (4).

Mr. *Druce*, Q.C., and Mr. *Atkin*, for the Plaintiff, were not called upon as to the £200 legacy. As to the £300 legacy, they contended that it was merely a gift of so much cash; the shares held by the testatrix were worth far more: moreover, she added the two legacies together to make the £500. Both legacies were, by the will, charged on the real estate, but, of course, if she meant one legacy to be specific it could not be so charged. It was clearly a demonstrative and not a specific legacy, and went with the other legacy: *Kirby* v. *Potter* (5).

Mr. *Osborne*, as to the £300 legacy, was not called upon.

LORD CAIRNS, L.C.:—

It seems to me impossible to treat this legacy of £300 otherwise than as a specific legacy of the interest which the testatrix had in the *General Steam Navigation Company*. This is made clear by the contrast between this and the following bequest, which is intended to be a legacy in gross, and simply pecuniary.

The next question is as to the effect of the codicil. I own that it has caused me some doubt, and I should be anxious, if I could see my way, to hold that the bequest meant only the rest and residue of the personal estate. But that construction would be taking a liberty with the words used by the testatrix which the Court would not be justified in taking.

The effect of the will is to give certain specific and pecuniary legacies, which are thus abstracted from the personal estate; and there is a gift of the residue. Then the codicil gives, devises, and

(1) 3 Mer. 50.
(2) 2 Ves. 652.
(3) 2 Atk. 268.
(4) 8 Ves. 481, 500.
(5) 4 Ves. 748, 751.

bequeaths all her personal estate, and I cannot treat these words as meaning anything but the whole of the personal estate which by her will she had divided into two portions, the legacies and the residue.

I concur, therefore, with the Master of the Rolls in thinking that the codicil operates as a revocation of all the previous dispositions of the personal estate.

Then comes the question as to whether the legacy remains charged upon the real estate. The true principles are stated very clearly by Lord *Eldon* in *Sheddon* v. *Goodrich* (1). If you have a legacy given and charged upon two funds—and it makes no difference whether it is charged primarily or secondarily upon either—then, if you find in a codicil a revocation of the legacy, of course the legacy is gone; but if you have such a charge, and then by a codicil or a subsequent part of the will a revocation of the gift of one of these funds, that does not operate as a revocation of the legacy, which remains unrevoked, and charged upon the other fund. Mr. *Osborne* said that a legacy is a gift *pro tanto* of personal estate, and that if you find in a codicil a gift of the whole personal estate, that revokes the gift of the legacy. But that argument seems to assume the whole question in this case. If the will contained nothing but a gift of a pecuniary legacy, then the codicil would have revoked the gift of the legacy; but the will contains not merely a gift of a pecuniary legacy—it also contains a charge on the real estate; and the codicil operates merely on the personal estate.

In my opinion the decree is right, and the appeal must be dismissed with costs.

Solicitors for the Appellants: Messrs. *Gray, Johnston, & Mounsey.*

Solicitors for the Plaintiff: Messrs. *Rickards & Walker.*

(1) 8 Ves. 501.

L. C.
1868
April 21.

BERNDTSON *v.* STRANG.

Stoppage in Transitu—Ship chartered by Purchaser—Money paid under Policy of Insurance.

A merchant in *Sweden* contracted to sell timber to *B.* in *England; B.* chartered a ship to fetch the timber, and insured it. The timber was damaged during the voyage, and before it arrived in *England, B.* had failed. The merchant in *Sweden* thereupon gave notice to the captain of the ship to stop the timber:—

Held (varying the decree of *Wood*, V.C.), that the merchant in *Sweden* was entitled as against the other creditors of *B.* to the proceeds of the sale of the timber, but not to money which had been paid for the damage under the policy of assurance.

THE Plaintiff in this case was a timber merchant in *Sweden*, and agreed to sell some timber to Messrs. *Langton & Robinson*, of *London*. After some discussion and changes, *Langton & Robinson* chartered a ship and sent her to *Sweden* for the timber, which was put on board, and the bill of lading was made out in the name of the Plaintiff, who indorsed it in blank and handed it over to *Langton & Robinson* in exchange for their bill of exchange for £1745. *Langton & Robinson* insured the timber and deposited the bill of lading and policy with Messrs. *Churchill & Sim*, as security for money due. The ship was stranded and damaged, and was many months on the voyage. Before she arrived in *England*, *Langton & Robinson* stopped payment, and executed a deed of arrangement with their creditors. The Plaintiff thereupon served the captain of the ship with notice to stop the timber *in transitu*. The ship arrived in *London;* Messrs. *Churchill & Sim* sold the timber, and received the proceeds of the sale, and also some money which had been paid under the policy of assurance; and having been satisfied out of other moneys, they paid the whole into Court in this suit, which had been instituted by the Plaintiff against the assignees of *Langton & Robinson* under their deed of arrangement. There was also a question as to a sum of money paid to the Plaintiff as dividend, which it is not necessary to notice in this report.

The Vice-Chancellor *Wood* held that the Plaintiff had a right

to the proceeds of the timber and to the money received under the policy, no distinction between these sums having apparently been taken on the argument before him. The case is reported (1), where the facts are fully stated.

The Defendants appealed.

Sir *Roundell Palmer*, Q.C., Mr. *Druce*, Q.C., and Mr. *Freeling*, for the Appellants, contended that this was not stoppage *in transitu*, using the arguments which were used before the Vice-Chancellor *Wood*, and that as to the insurance money, it was clear that the Plaintiff could have no claim to it.

At the close of their argument the Lord Chancellor said he had no doubt that as to the proceeds of the sale of the timber it was a case of stoppage *in transitu*.

Mr. *Kay*, Q.C., and Mr. *Gardiner*, for the Plaintiff:—

It is impossible to separate the insurance money from the goods; the purchaser gets the money under the policy representing part, and the proceeds of the sale representing the other part, and the whole must be subject to stoppage: *Lickbarrow* v. *Mason* (2). The purchaser recovers from the underwriter, subject to the vendor's lien.

LORD CAIRNS, L.C.:—

On the question in this suit which was argued mainly, if not exclusively, in the Court below, I entertain no doubt, and I have not heard the counsel for the Respondent upon it. It appears to me that this is a very plain and simple case of a right to stop *in transitu*, which has been properly exercised. There was a contract for the sale of timber by the Plaintiff to the firm of Messrs. *Langton & Robinson*. The timber was appropriated according to the contract, and was put on board a particular ship. A bill of exchange was drawn for the price and accepted. A bill of lading was made out making the timber deliverable in the usual way to order, and that bill of lading was indorsed over to Messrs. *Langton & Robinson*. Without going further, those circumstances

(1) Law Rep. 4 Eq. 481. (2) 1 Sm. L. C. 595, 4th Ed.

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clearly operated to transfer the property in the timber to *Langton & Robinson*, but the question remains as to the possession of the timber.

The contract originally stipulated that the timber should be delivered free on board a ship or ships to be provided by the vendors. That part of the contract was varied afterwards, and an arrangement was substituted that Messrs. *Langton & Robinson* should themselves charter a vessel to convey the timber from *Sweden* to *London*; the charterparty has not been produced, but it has been assumed on both sides, as, indeed, seems to be consistent with the averment, that it was a charter of an ordinary kind, not making *Langton & Robinson*, even for the time, the owners or hirers of the ship, but merely operating as by way of contract with the owners of the ship that they would carry timber to a particular port.

11 W.R. 567.

The timber was delivered free on board the ship which was chartered by *Langton & Robinson;* and it appears to me that the case is exactly such a case as is pointed out by the words of Lord *Cranworth* in *Gibson* v. *Carruthers* (1). The goods put on board the ship were "in the custody of some third person intermediate between the seller who has parted with, and the buyer who has not yet acquired, actual possession." I think the very best test is afforded by the question:—what would be the case suppose the shipowner or shipmaster had misconducted himself, and either carelessly lost the goods or misdelivered them? The purchaser, by virtue of his right of property in the goods, would bring an action against the owner of the ship, and would declare that he, the purchaser, had entrusted the goods to his care, that they were in his hands for the purpose of being safely carried to and delivered in *London*, and that during the time they were so in his custody as the middle-man or carrier, the goods had come to loss by virtue of his misconduct. All that supposes possession, not in the purchaser, but in the shipowner by means of his custody. I think, therefore, that the conclusion the Vice-Chancellor arrived at on the only point argued before him was perfectly correct and, there being reason for bringing this matter into Equity, that the Plaintiff should be treated as a person who had a right to stop the cargo *in transitu*.

(1) 8 M. & W. 321, 328.

There arise two other questions in the case: The cargo did not come home entire and uninjured to *London:* a part of it was lost or injured by the peril of the sea on the voyage. Messrs. *Langton & Robinson,* the purchasers, had effected an insurance upon the cargo; the ship was carrying the goods of other persons—the claim was made for a general average, and there was of course the loss upon the particular goods of *Langton & Robinson* themselves. The proceeds of the timber when it was sold were in part recovered by the owners of the other goods for general average; and there was the loss of *Langton & Robinson* upon their own parcels of goods. In respect of the general average and the particular average they have been indemnified or repaid by the insurance office upon their policy. The vendor entitled to stop the goods *in transitu* claims further, not merely to have the net proceeds of the goods which arrived in this country, but to have the money which was paid on the policies by the underwriters.

It appears to me that this is a claim wholly untenable, and, I might say, altogether unexampled in my experience. The right to stop *in transitu* is a right to stop the goods in whatever state they arrive. If they arrive injured and damaged in bulk or quality the right to stop *in transitu* is so far impaired; there is no contract or agreement which entitles the vendor to go beyond those goods in the state in which they arrive, and to claim some moneys which have been paid by the underwriters to the purchasers of the goods in respect of their loss by the non-arrival of their property. The moneys recovered upon the policy have, under the circumstances stated at the Bar, come into Court, and no notice appears to have been taken on the argument before the Vice-Chancellor of the distinction between those moneys and the moneys resulting from the sale of the cargo; but now that the attention of the Court is drawn to it, of course the distinction must be recognised, and the money representing the policy money must be restored to Messrs. *Langton & Robinson,* or those who represent them:—[His Lordship then decided that an alteration must be made in the decree as to the dividend, and then continued:—]

I think the decree of the Vice-Chancellor was right in giving the Plaintiff his costs, which were given out of the fund in

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Court, because it was then sufficient, but it will now be insufficient; therefore the costs must be paid by the Defendants personally. The alterations which will be made in the decree are considerable; and although it is to be regretted that these matters were not more carefully considered on the original hearing, I cannot, after these alterations in the decree, make the Defendants pay the costs of the appeal as if the appeal had been simply dismissed. There will be no costs of the appeal, and the deposit will be returned.

Solicitors: Mr. *J. W. Nicholson;* Messrs. *Linklaters, Hackwood, & Addison.*

L. C. 1868 *May* 27.

In re BOWRON, BAILY, & CO. *Ex parte* BAILY.

Shareholder—Acceptance of Shares—Reasonable Time—Delay.

5 W.R. 610

On the 6th of October, 1865, *B.* saw the prospectus of a company which proposed to start without the delay of a day, and to allot shares on the 14th of October, and he thereupon applied for and paid the deposit on ten shares. The company was registered in December, and then issued a different prospectus, which was sent to *B.* in January. On the 3rd of February he received notice that ten shares had been allotted to him, and on the 7th of February he wrote to decline them, and asked for a return of his deposit, which was refused. After this he made no application to have his name taken off the register until December, 1867, when a call had been made:—

Held, that after the delay in allotting the shares, *B.* was not bound by his application to take them; and that he was not prevented by his subsequent delay from having his name struck off the register.

Order of *Wood*, V.C., affirmed.

In the autumn of 1865 a company was proposed, to be called *Bowron, Baily, & Co., Limited,* and to take over the business of glass bottle makers then carried on by Messrs. *Bowron, Baily, & Co.* A prospectus, said by the company to be merely a proof, had been sent by one of the promoters to the father of the Rev. *J. Baily*, the applicant in this case, with a request that he would induce his family to take shares, and this prospectus was by him sent to Mr. *J. Baily.* The prospectus stated that the com-

pany had agreed with the private firm, and would thus start without the delay of a single day on a well-organized business, that the transfer of the business would date as from the 30th of September, and that the shares would be allotted on the 14th of October. Mr. *J. Baily* signed the usual form of application for ten shares annexed to the prospectus, and sent it with a deposit of £10 on the 6th of October, and received a receipt on the following day. The company was registered on the 5th of December, 1865, and then issued a prospectus, but Mr. *J. Baily* heard no more of it until some time in January, when he received the prospectus of the company, which differed materially from the original prospectus. On the 3rd of February, 1866—as was assumed by the Court, though there was some controversy about it—he received a notice that the shares had been allotted to him; and on the 7th of February he wrote saying that he had made up his mind to decline taking any shares in the company, and requesting to have his deposit returned. On the 8th of February the secretary of the company wrote that he could not comply with the request, as the shares were allotted. On the 14th of February a call was made, but not paid by *Baily*. Some further letters passed, and notices of dividends, &c., were sent to Mr. *J. Baily*, of which he took no notice. A call was made in October, 1867, and he was threatened with proceedings, whereupon, in December, 1867, he moved, under the 35th section of the *Companies Act*, 1862, to have the register of the company rectified by striking off his name.

The Vice-Chancellor *Wood*, before whom the application was heard, made an order on the 22nd of February, 1868, for striking off the name (1).

The company appealed.

Mr. *Kay*, Q.C., and Mr. *Fry*, for the Appellants, contended that the prospectus of which the Plaintiff complained had not been issued by the company, and the applicant could not complain of having been deceived by the company. Mr. *Baily* kept the contract open by leaving his deposit: *Ramsgate Hotel Company* v. *Montefiore* (2). If he wished to abandon his contract, he ought

(1) Law Rep. 5 Eq. 428. (2) Law Rep. 1 Ex. 109. 12 Jur N S 455

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to have taken proceedings earlier to have his name removed, if he thought that he was entitled to do so, and he ought not to have allowed his name to remain on the register: *Taite's Case* (1); *Pellatt's Case* (2); *Hebb's Case* (3).

Mr. *Druce*, Q.C., and Mr. *Osborne Morgan*, for Mr. *Baily*, were not called upon.

Lord Cairns, L.C., said that the question was simply between Mr. *Baily* and the company, and was not a question in which creditors of the company had any concern, and it was distinctly at issue between the company and Mr. *Baily* in February, 1866. It would, on the one hand, have been impossible for Mr. *Baily*, after what then took place, to come in at a future period if the company had been prosperous, and to have claimed his right as a shareholder of the company; and, on the other hand, the company had it in their power, as they made a call within a few days afterwards, to have raised the question, if they had been so advised, whether Mr. *Baily* ought to be considered a shareholder. His Lordship did not think, therefore, that the delay that had taken place since the beginning of February, 1866, could affect the question, there being no winding up of the company, and no question with regard to creditors. The company was not in existence in October, 1865, but was registered on the 5th of December of that year. Between that day and the 3rd of February, 1866, a period of nearly two months, no communication was made on behalf of the company to Mr. *Baily*, informing him that the company accepted, or that it was in their power to accept, the offer which he had made on the 6th of October, 1865. If the matter rested there, his Lordship would feel very great doubt whether in a case of a trading company actually carrying on trade, which had taken over a going business as from the 30th of September previous, and which therefore was a company carrying on business, and having liabilities in the most distinct sense of the term, it would be competent for those who were directing and managing the company to abstain for two months from informing a person who had made them an offer to

(1) Law Rep. 3 Eq. 795. (2) Law Rep. 2 Ch. 527.
(3) Law Rep. 4 Eq. 9.

become a shareholder in the company some time previous to its formation, whether they accepted the offer or not, and, at the end of two months, to state to him that they did accept his offer, and thereupon to hold him bound by it. It was very doubtful whether the delay was not, even as regards those dates, so long as to make it impossible for the company to say that they had accepted the offer that was made to them within a reasonable time. But the matter in this particular case became more clear, because the company were seeking to take the benefit of a proposal which was, in some manner or other, made on the invitation of those who were forming the company at a period antecedent to its registration. Without going into questions of difficulty as to the relative position of the promoters of the company, and of the company when formed, His Lordship would assume, for the purpose of argument, that the company would be entitled to claim the benefit of any offers made by third parties to the promoters of the company; but, upon that assumption, it was perfectly clear that the company, if it sought to take the benefit of the acts of the promoters, must take it in the way in which they were done. Now, the evidence as to what the promoters did before the company was registered was very unsatisfactory. His Lordship then commented on the evidence, and came to the conclusion, that there was no kind of contradiction to the statement that Mr. *Charles Baily*, one of the promoters, went to the father of the present applicant, and asked him to induce his family to take shares, giving him a document on which it was clear that the applicant was led to apply for the shares, and that this document contained a distinct statement that the shares which he applied for would be allotted by the 14th of October, and that he would then be in the position of a shareholder in a going concern. That being the character of the application, and, assuming in favour of the company that an application made to promoters under those circumstances might be adopted by the company, and that nothing more would be wanting to make an agreement than an allotment of shares, and a communication of that allotment, still the acceptance of the offer must be made within a reasonable time—a reasonable time must be proved in each case in reference to the circumstances of the case; and in this case they required an

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allotment in substance of the same kind, and as speedy as was indicated by this prospectus; and that certainly was not done. His Lordship had treated the present application as raising the question whether there was a concluded agreement and contract to take shares, and the circumstance that the company had put the name on the register was, of course, that which led to the application to rectify the register. In order to justify the name being so put upon the register, it lay upon the company to shew that there was a contract to take the shares on the part of Mr. *Baily;* but His Lordship thought that there was no such contract; and therefore concurred in the conclusion which the Vice-Chancellor had arrived at, and dismissed the appeal with costs.

Solicitors for Mr. *Baily:* Messrs. *Wood, Street, & Hayter,* agents for Messrs. *Keary & Stokes, Chippenham.*

Solicitors for the Company: Messrs. *Sharp & Ullithorne.*

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L. JJ.
1868
April 22, 25; May 6, 27.

Freight—Assignment—Mortgagee of Ship—Priority—Completion of Voyage.

A shipowner mortgaged a ship to *T.*, and by a deed of even date assigned to *T.* all charterparties and freight by way of further security. The mortgage referred to the deed of even date, stating that it contained covenants for payment of the mortgage money, for insuring, and for payment of other moneys, but not alluding to its containing anything more. A charterparty was subsequently effected by the owner, the freight to be paid "on unloading and right delivering of the cargo, as customary," and the owner was to have a lien for the freight on the cargo. During the voyage the owner assigned the freight under this charterparty to *B.*, who knew of the mortgage. The ship arrived in port, and most of the cargo, which was a general one, was delivered to the respective consignees; but before the whole had been delivered, *T.* took possession of the ship:—

Held (reversing the decree of *Stuart*, V.C.), that *T.*, as mortgagee of the ship, having taken possession of her before any freight had become payable from the charterers to the owners, was entitled to the freight in priority to *B.*

Whether *B.* could have been held to have constructive notice of the prior assignment of freight to *T.*, so as to entitle *T.* to priority over him by virtue of that assignment—*quære*.

THIS was an appeal by the Defendant *Tanner* from an order of Vice-Chancellor *Stuart*, giving effect to the Plaintiff's security in priority to his (1).

The Defendant *Hall*, being the owner of the ship *Pharamond*, mortgaged it to *Tanner* by a deed in the statutory form, dated the 25th of September, 1862. The mortgage was for securing £2000 advanced, and also an account current. This mortgage was duly registered on the following day. By a separate deed, of even date with the mortgage, *Hall* assigned all charterparties, freight, earnings, and passage-money to *Tanner*, by way of further security, and also covenanted to effect certain insurances upon the ship. The statutory mortgage recited, "that by an indenture of even date the mortgagor had covenanted with the mortgagee for payment of the £2000 and interest, and for insuring and keeping insured the ship, and for the payment of the other moneys therein

(1) Law Rep. 2 Eq. 806.

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mentioned;" but the recitals did not refer to any assignment of charterparties or freight.

At the date of the mortgage no charterparty was, in fact, in existence, but on the 27th of November, 1863, the Defendant *Hall* chartered the ship to the Defendants *Phillips & King*. By the charterparty the vessel was to proceed from *Liverpool* to the *Cape of Good Hope*, and thence to *Algoa Bay*, and was there to take in a "complete cargo of lawful merchandize," which the charterers undertook to ship, and being so loaded she was to proceed direct to *London*, and deliver the same on being paid freight after certain specified rates for the various articles of general merchandize in the charterparty enumerated.

By the charterparty it was further agreed that the freight was to be paid "on unloading and right delivering of the cargo, as customary." The master was to sign bills of lading at any rate of freight, if required, without prejudice to the charterparty. The owners were to have an absolute lien on the cargo for all freight, dead weight, and demurrage. The freight was to be collected by the charterers.

On the 12th of February, 1864, the vessel being at sea under the charterparty, *Hall* accepted two bills of that date for £500 each, drawn on him by the Plaintiff *Brown*. On the 20th of May, 1864, he assigned the freight and earnings of the ship, and the moneys to be received on insurances, to the Plaintiff, as a security for payment of the bills. On the 16th of July, 1864, notice of this assignment was formally given by the Plaintiff's solicitor to Defendants *Phillips & King*, the charterers. The Plaintiff had actual knowledge of the registered mortgage at the date of the discount of the bills, but no further notice of the deed of even date than what was contained in the recitals of the registered mortgage.

On the 1st of September, 1864, the ship arrived in the port of *London*.

The ship broke bulk on the 9th of September, 1864. On the 26th of September, 1864, the Appellant *Tanner* (by his agent), took possession of the ship, and on the 30th of September served a written notice on the charterers, of his mortgage on the ship, and of the assignment of even date.

It was agreed that at the time of possession being taken of the

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ship, the whole of the cargo had not been delivered, although the greater part had been delivered by the charterers to the respective consignees thereof, it being a general cargo. Upon these facts the Plaintiff claimed to be entitled to the freight payable by the charterers as the assignee thereof, alleging that he had no notice of the assignment made to the Appellant by the indenture of even date with the mortgage, and that having given the first notice to the charterers of an assignment, he was entitled to priority over the Appellant. The Appellant, on the other hand, alleged that the Plaintiff must be taken to have had full notice of the prior assignment of the freight made by the deed of even date with the mortgage, inasmuch as the mortgage recited or referred to such indenture, although it did not recite the part whereby the freight was assigned. The Appellant further contended that having taken possession of the ship as mortgagee before the freight payable under the charterparty became due, he was entitled to receive that freight as owner, irrespective of any charge attempted to be created thereon by his mortgagor.

The Vice-Chancellor held the Plaintiff to be entitled to the priority which he claimed.

Apr. 22, 25. Mr. *Karslake*, Q.C., and Mr. *W. W. Karslake*, for the Appellant:—

The assignment of future freight to *Tanner* was good: *Lindsay* v. *Gibbs* (1); *Douglas* v. *Russell* (2). The notice by the Plaintiff to the charterers was inoperative: *Buller* v. *Plunkett* (3); *Somerset* v. *Cox* (4). *Tanner* has priority in time, and the Plaintiff had notice of his title to the freight, his knowledge of the mortgage gave him constructive notice of the cotemporaneous deed and its contents: *Hall* v. *Smith* (5); *Peto* v. *Hammond* (6). The voyage was incomplete, and the mortgagee took possession in time to entitle him to the freight in his character of mortgagee of the ship: *Cato* v. *Irving* (7).

(1) 22 Beav. 522. 2 Jur. N.S. 1057
(2) 4 Sim. 524.
(3) 1 J. & H. 441. 7 Jur. N.S. 873
(4) 33 Beav. 634. 10 Jur. N.S. 357.
(5) 14 Ves. 426.
(6) 30 Beav. 495. 8 Jur. N.S. 550
(7) 5 De G. & Sm. 210.

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Mr. *Druce*, Q.C., and Mr. *Robinson*, for the Plaintiff, were desired by the Court to confine themselves to the question as to the effect of taking possession:—

It is settled that the mortgagee of a ship takes possession subject to all equities then subsisting: *Collins* v. *Lamport* (1), where it was held that the analogy of leases made by a mortgagor of real estate did not apply to mortgages of ships, and that the mortgagee took possession subject to contracts made by the mortgagor.

The LORD JUSTICE SELWYN:—How far do you propose to carry that principle? It may well hold as to contracts which must be entered into if the ship is not to lie idle, and yet not apply to an assignment of freight.

We say that the mortgagor remains owner, 17 & 18 Vict. c. 104, (*Merchant Shipping Act*, 1854), s. 70, and that the fruits belong to him, and may be dealt with by him till something amounting to taking possession has been done by the mortgagee, and that, therefore, a security on the earnings given before possession taken, or notice given by the mortgagee, is good against him, the limitation being that the dealing must not be one inconsistent with the mortgage security. A statutory mortgage does not mention the freight, but the law gives the mortgagee the benefit of it if he takes possession before the end of the voyage: *Kerswill* v. *Bishop* (2); but not otherwise: *Gardner* v. *Cazenove* (3). This, however, must be subject to previous dispositions of it. If he takes the benefit of a contract made by the mortgagor, he must take it subject to all equities. *Cato* v. *Irving* (4) extended the limits of the voyage, and held it not to have concluded because no part of the cargo had been discharged, though according to common acceptation it had ended. This doctrine is not to be extended, and in the present case nearly all the cargo had been discharged. Mercantile usages would be disturbed by the allowance of this appeal. A broker makes advances for expenses on the faith of receiving the freight; if a mortgagee steps in before the unloading commences, no expenses are incurred and no harm is done; but great wrong is done if he can step in after nearly all the expenses have been incurred.

(1) 13 W. R. 283; 11 Jur. (N.S.) 1.
(2) 2 C. & J. 529.
(3) 1 H. & N. 423.
(4) 5 De G. & Sm. 210.

19 L.C. 42 L.J.C. 500

Mr. *Holland*, for the charterers.

Mr. *Karslake*, in reply, referred to *Mashiter* v. *Buller* (1); *Davidson* v. *Gwynne* (2); *De Mattos* v. *Gibson* (3).

May 6. Their Lordships desired to have the case further argued on the question whether the voyage was complete.

Mr. *Karslake*, Q.C., for the Appellant:—

Cato v. *Irving* (4) lays down the rule that the voyage is not complete till the cargo has been discharged. It has been universally recognised as establishing that principle. The mortgagee can entitle himself to the freight if it has not become due before he takes possession; and here it was not due, for nothing was payable by the charterers to the owners before the goods were delivered, the delivery of all the goods being a condition precedent to the right to recover freight, which cannot be apportioned: *Roberts* v. *Brett* (5); *Hunter* v. *Prinsep* (6); *Ritchie* v. *Atkinson* (7); *Dakin* v. *Oxley* (8).

Mr. *Druce*, Q.C., for the Plaintiff:—

The goods here were deliverable at different places, and on a delivery of some a right to apportioned freight arises. Lien here was expressly reserved, so the question in *Paynter* v. *James* (9), whether the delivery was a condition precedent, does not arise, the delivery and payment are to be cotemporaneous. The lien being reserved, an action for freight would lie on a partial delivery: *Black* v. *Rose* (10); *Moeller* v. *Young* (11). A large cargo cannot be delivered at once, so the rule in *Moeller* v. *Young* is founded on the reason of the thing. In *Cato* v. *Irving* the mortgagee took possession while all the goods were in the ship, and so put himself in a position to deliver them to the consignees, which entirely dis-

(1) 1 Camp. 84.
(2) 12 East, 381.
(3) 1 J. & H. 79. 7 Jur. N.S. 282
(4) 5 De G. & Sm. 210.
(5) 11 H. L. C. 337. 11 Jur. N.S. 377
(6) 10 East, 378.
(7) Ibid. 295.
(8) 15 C. B. (N.S.) 646.
(9) Law Rep. 2 C. P. 348.
(10) 2 Moo. P. C. (N.S.) 277.
(11) 5 E. & B. 7, 755. 2 Jur. N.S. 393.

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tinguishes that case from the present. *Willis* v. *Palmer* (1), and *Dobbyn* v. *Comerford* (2), are favourable to us. The *dictum* in *Collins* v. *Lamport* (3), that a mortgagee of a ship can obtain the benefit of the mortgagor's contracts by giving notice, is not according to the authorities.

Mr. *Karslake*, in reply.

May 27. SIR W. PAGE WOOD, L.J., after stating the facts, delivered the judgment of the Court as follows:—

We do not think it necessary to determine whether or not the Plaintiff must be considered as affected by notice of the assignment of all freight to the Appellant, in consequence of the reference in the mortgage of even date to the instrument by which such assignment was made. If it were necessary to decide this, then the case of *Jones* v. *Smith* (4), affirmed by Lord ~~Cottenham~~ on appeal (5), would tend to support the Plaintiff's contention, for if the Appellant chose in his recital of the deed of even date to omit all mention of the assignment of freight, the Plaintiff could not reasonably be expected to know more of an instrument whose production he could not enforce than what was given by the recital itself.

But it appears to us that this case must be determined in the Appellant's favour on the ground of his having taken possession of the ship before the freight under the charterparty had become due.

It is now settled beyond all dispute that the mortgagee of a ship becomes entitled to all the rights and liable to all the duties of an owner from the time of his taking possession. Amongst the rights so accruing to him is that of receiving all freight remaining due when possession is taken.

The mortgagor, up to the time of such possession being taken, remains absolute owner, under a legal title, for every purpose save

(1) 7 C. B. (N.S.) 340.
(2) 10 Ir. Ch. Rep. 327.
(3) 13 W. R. 283; 11 Jur. (N.S.) 1.
(4) 1 Hare, 43.
(5) 1 Ph. 244.

this important exception, namely, "except in so far as may be necessary for making such ship available as a security for the mortgage debt." He can, therefore, bind the mortgagee by a charterparty, being, to that extent, in a different position from the mortgagor of real property, who cannot bind his mortgagee by a lease. This was decided by Lord *Westbury* in *Collins* v. *Lamport* (1). But we cannot accept the inference drawn from that case by Mr. *Druce*, viz., that the mortgagor, having so effected a charterparty, can also mortgage the freight before it becomes due, so as to prevent the mortgagee of the ship, on taking possession before the freight is due, from receiving it. So to hold would enable the mortgagor to deprive the mortgagee of the whole benefit of the security. The ship might be chartered for several years, and the freight immediately assigned behind the back of the mortgagee.

The only question, then, really is, had the freight become due when the Appellant took possession? and this point we wished to have re-argued—the matter not appearing to have been fully discussed either in the Court below or at the first hearing before us.

In the text books (which are fully borne out by the authorities) the freight is said to be due when "the voyage is ended." But this expression does not afford a sufficiently definite rule. When was the voyage ended in such a case as the present? In *Cato* v. *Irving* (2), *Parker*, V.C., determined that the voyage was not ended on the mere arrival of the ship in port. He says (3) "the right to the freight does not accrue until the goods are not only conveyed to their destination but are also delivered." And it is singular that no distinct authority seems to carry the point further.

On principle, we conceive that the freight cannot be due from the charterers on a charterparty such as the present, until they have had the full user of the ship for the purposes for which they chartered it. It is, in fact, analagous to the demise of property until a given purpose is answered, the purpose in this case being, first, the outward voyage; second, the taking in of a complete cargo at such profit freight as the charterers may be able to obtain

(1) 13 W. R. 283; 11 Jur. (N.S.) 1, 4 De G. & Sm. 210. (2) 5 De G. & Sm. 210.
J. S. 500 (3) Page 224.

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above the freights they have agreed to pay to the owner; and, third, the delivering of the cargo to the consignees by the charterers. The freight is expressly payable (under the charterparty) "on unloading and right delivering of the cargo as customary," and "the freight is to be collected by the charterers."

Now, it is not alleged that there was any undue delay on the part of the charterers in the unloading and delivering. Until, therefore, that was absolutely completed, it appears to us the freight was not due to the owner, and if this be so the mortgagee, having taken possession and made himself owner before such complete delivering, is entitled to demand and receive the freight.

Upon the second argument Mr. *Druce* endeavoured very ingeniously to apply the cases which have determined that there may be a demand of freight on a partial delivering to the present case, so as to raise a claim for the greater part of the freight, inasmuch as the greater part of the cargo had been delivered before possession was taken by the Appellant. But, on examining the cases referred to by him, of which *Moeller* v. *Young* (1) may be taken as an example, it will be found that they rest on the ground of a new assumpsit, arising from the permission of a partial delivering by the owner, viz., that in consideration of his waiving his lien on the parcel delivered, the charterer undertakes to pay the freight due on that parcel. But this fresh assumpsit would not supersede the original contract to pay on the delivering of the whole. We have already held that the benefit of that original contract could not be assigned to a third person by a mortgagor to the prejudice of his mortgagee, and, therefore, the whole freight having become due on the original contract before any assertion of right on such an implied fresh assumpsit in respect of partial delivering, it appears to us that the Appellant, being in possession, became entitled to the full amount of the freight due to the owner from the Defendants *Phillips & King*.

The decree made, therefore, by the Court below must be varied, and it appearing that the amount due to the Appellant would far exceed the moneys due from *Phillips & King*, there is no foundation for a decree for redemption by the Plaintiff, and the bill must be dismissed with costs.

(1) 5 E. & B. 7, 755.

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There will be no costs of the appeal, except that *Phillips & King* must retain their costs out of the freight payable by them, and the deposit will be returned.

Solicitors: Messrs. *Cotterill & Sons*; Mr. *T. Baker, Jun.*

GRAYBURN *v.* CLARKSON.

L. JJ.
1868
May 2.

Executor—Failure to convert within Twelve Months.

A testator entitled to shares in a company with unlimited liability, directed his executors to convert his estate with all convenient speed. *P.* one of the three executors died a year and five weeks after the testator. The shares were not converted, and about fifteen years afterwards the company was wound up, and the surviving executors being placed on the list of contributories paid a large sum out of the estate for calls. A bill was filed against the surviving executors, and the executors of *P.*, to make them liable for the loss. *P.'s* executors did not answer, nor did they in evidence give any reason why conversion had not taken place within twelve months from the testator's death:—

Held (affirming the decree of *Stuart*, V.C.), that *P.'s* estate was liable for all loss occasioned to the testator's estate by the omission to sell the shares within twelve months; and that as *P.'s* executors had not suggested by answer or evidence any reason for the delay, no inquiry could be directed on the subject.

Whether the calls were a loss thus occasioned to the testator's estate, *quære*.

THIS was an appeal by the executors of a Mr. *Picard* from a decree of Vice-Chancellor *Stuart*.

The testator, by his will, appointed three executors, of whom *Picard* was one, and directed them to convert his estate with all convenient speed. He died on 12th February, 1847, and all the executors proved his will. He was at his death a shareholder in the *Leeds Banking Company*, which was a company with unlimited liability. *Picard* died on 20th March, 1848. The shares were retained till 1864, when an order was made for winding up the bank. The surviving executors were placed on the list of contributories and paid £550 for calls. The present suit was instituted by persons interested in the estate to make the surviving executors liable for the loss arising from retaining the shares. *Picard's*

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executors were not at first made parties, but were afterwards made so by amendment. The bill alleged that the shares ought to have been converted within twelve months from the death of the testator, and charged that *Picard's* estate, as well as the surviving executors of the testator, was liable for the loss arising from this not having been done. *Picard's* executors put in no answer, nor did they give in evidence any reason why the shares were not sold during his life. The Vice-Chancellor made a decree declaring that *Picard's* estate was liable for the loss sustained by the testator's estate in consequence of the shares not having been sold within twelve months from the decease of the testator.

Mr. *Druce*, Q.C., and Mr. *Lindley*, for the Appellants, referred to *Buxton* v. *Buxton* (1); *Garrett* v. *Noble* (2); *Kirkman* v. *Booth* (3).

Mr. *Greene*, Q.C., and Mr. *Bagshawe*, for the Plaintiffs, were not called upon.

SIR W. PAGE WOOD, L.J.:—

Although this is a very hard case, we do not see how we can relieve the Appellants from the position in which they are placed. They raised no case for inquiry in their answer, and accordingly no inquiry was directed. The result of the authorities seems to be, that there is no fixed rule that conversion must take place by the end of the year, but that that is the *primâ facie* rule, and that executors who do not convert by that time must shew some reason why they did not do so, and, where the question is distinctly and fairly raised upon the pleadings, there is an *onus* thrown on the executors to justify the delay. Here the Appellants, having an opportunity of putting in their answer, made no statement on which the Court could found an inquiry as to the circumstances under which the delay took place. It is now suggested that Mr. *Picard's* illness made it impossible for him to take any steps towards the conversion of the estate. I think that is hardly a case for us to inquire into, for it ought to have been brought before the Court originally. What we have before

(1) 1 My. & Cr. 80. (2) 6 Sim. 504.
(3) 11 Beav. 273.

us is the statement in the bill that there was no realization within thirteen months after the death of the testator, which is not denied, and a charge that the Defendants ought to be fixed in consequence with the loss sustained. The question was raised—on what principle the amount of the liability of the Appellants is to be ascertained. It appears to us that the decree leaves that open entirely. In the case of *Devaynes* v. *Robinson* (1), to which I have been referred by the Lord Justice *Selwyn*, the Master of the Rolls had to consider whether there was any difference between a loss occasioned by default and a loss occasioned by act. He held that there was in substance no difference. Where a loss has been occasioned by wilful default, since the duty of the trustee was to do that act which he has omitted to do, he by omitting to do the act has been guilty of a breach of trust, for the consequences of which he is liable though they do not develope themselves until long after, for the trustee not having put the property where it ought to be, it stands at his risk until it has been put into the position in which he was bound to place it. In the present case no reason having been suggested on the pleadings why the property was not converted within the year, we should not feel justified in saying that there ought to have been any inquiry directed as to the circumstances under which that delay took place. Then as to the executors being held liable to make good the loss sustained to the testator's estate by not selling the shares within the year, so far as such loss is the direct result and consequence of the omission, the decree must be right. If the reasoning of Mr. *Lindley* be correct, that the payment to the liquidator of the £550 by the surviving executors is not a loss accruing to the testator's estate in consequence of any default of *Picard*, *Picard's* executors will have the benefit of that when the matter comes back for further consideration, and the question will be:—Is that a loss sustained to the estate by reason of the shares not having been sold within the year? If the £550 is only something which has been paid by the surviving executors, and which they are not entitled to repay themselves out of the estate, then the estate has not in this respect suffered a loss through *Picard's* default, and there will be no charge against *Picard's* executors on that account, for if the surviving

(1) 24 Beav. 86.

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executors have improperly recouped themselves out of the estate moneys for which it was not liable, the loss is attributable only to them.

SIR C. J. SELWYN, L.J.:—

In this case the testator directed that his executors should with all convenient speed after his decease sell his real estate, and convert into money such part of his personal estate as should not consist of money. I agree with the argument of Mr. *Druce* and Mr. *Lindley*, that those words do not render it obligatory upon the executors to sell at any precise, definite, or particular time, but that they were entitled to exercise a reasonable discretion. But how ought that reasonable discretion to have been exercised? A portion of the estate of this testator consisted of shares in a trading company with unlimited liability. It certainly was the duty of the executors with all convenient speed, and, indeed, as early as possible, to sell shares involving such a liability, and the bill has most distinctly raised that very question, by stating that it was their duty to sell these shares within the year, and that they omitted to perform this duty. The question as to the time within which executors are bound to convert arose in *Hughes* v. *Empson* (1), with regard to *Crystal Palace* shares, not involving any such liability as attaches to the shares in this case. In that case the Chief Clerk thought that the shares ought to have been sold within six months, but the Master of the Rolls allowed twelve months as the reasonable period. According to the evidence in this case, it is impossible to doubt that within twelve months these shares might have been sold, and the case is brought on without any suggestion on the pleadings or in the evidence why they were not so sold. I think, therefore, that the Vice-Chancellor was perfectly justified in making the declaration which he did as to the liability of the estate of *Picard*. The principle is very clearly pointed out in *Devaynes* v. *Robinson* (2), where the Master of the Rolls says (3), "I cannot accede to the view that if a trustee commit a breach of trust, and the consequences of it do not occur until after his death, his estate is not to be made liable, because if redress

(1) 22 Beav. 181.

(2) 24 Beav. 86.

(3) 24 Beav. p. 95.

had been sought in respect of that breach of trust it was reparable during his lifetime. It is admitted that such would be the rule with respect to an active breach of trust, as if a trustee did an act by which he placed the trust money in an improper investment, even although the loss might not have been sustained during his lifetime, still, if the consequences of that act were a total loss after his death, his estate would be then liable. I have spoken of the commission of a breach of trust which involves activity, whereas here the breach of trust arises from the want of doing some act, but if the breach of trust arises from the trustee doing no act at all it would equally be one for which his estate would be liable to make good the loss thereby occasioned." Here, I think upon the pleadings and evidence it is established that a loss has been occasioned from the trustee doing no act at all, and consequently it is a loss for which his estate must be liable. Whether this liability extends to the £550 is a question we are not now called upon to decide. If the surviving executors chose to make a present to the official liquidator out of the estate of a certain sum of money, that is not a loss sustained by the estate in consequence of *Picard's* default, and it will have to be decided hereafter whether that was the character of the payment. The decree appears to me very carefully and accurately framed in that respect, limiting the liability to loss sustained by the testator's estate in consequence of *Picard's* default. I agree, therefore, in thinking that this appeal fails, and must be dismissed with costs.

Solicitors: Messrs. *Eyre & Co.;* Messrs. *R.. & W. B. Smith.*

L. JJ.
1868
May 8.

Ex parte PETRIE. *In re* PETRIE. (No. 2.)

Bankruptcy—Order of Discharge—Resolution to suspend Proceedings—Liability of Bankrupt to Examination—Bankruptcy Act, 1861, *ss.* 110, 159.

Where the proceedings in a bankruptcy are suspended in consequence of an arrangement with the creditors under the 110th section of the *Bankruptcy Act*, 1861, although the bankrupt, having made a full disclosure of his estate, is entitled to apply for his discharge, yet he is not entitled to his discharge as of course, but must submit to be examined, and is subject to the rules of the 159th section.

Ex parte McKerrow (1) followed.

THIS was an appeal from a decision of Mr. Commissioner *Perry* of the *Liverpool* District Court of Bankruptcy.

The bankrupt, *James Petrie*, was a sail-cloth manufacturer at *Liverpool*. He was adjudicated bankrupt on the petition of Messrs. *Leyland & Bullins*, bankers of *Liverpool*. At the first meeting of creditors a proposal was made on behalf of the bankrupt that he should pay a composition of 5*s*. in the pound; that he should give to his creditors promissory notes for the amount of their composition, by three instalments, at dates of three, six, and nine months from the time of the proposal becoming binding; the last two instalments being guaranteed by Messrs. *Eyre, Evans, & Co.*

On the 2nd of March a resolution was passed by the majority of the creditors accepting the proposal, and on the 16th of March the resolution was confirmed by a majority of three-fourths of the creditors present, under the 110th section of the *Bankruptcy Act*, 1861, and it was resolved: "That no further proceedings be taken in this matter in bankruptcy, and that the proceedings in this matter be suspended, and that the proposal made by the bankrupt at the said meeting of the 2nd of March, 1868, be accepted, and that the estate and effects of the said bankrupt in the hands of the assignees (save as is otherwise provided by the said proposal), be delivered up to the bankrupt, and that the said bankrupt shall, subject to the direction of the creditors' assignee, proceed to sell and get in the remainder of the estate and effects of the bankrupt, and apply the same in accordance with the said proposal."

(1) 13 W. R. 1002.

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An appointment was then made for the last examination, and the bankrupt attended on the day named, and filed his accounts and applied for his discharge. The petitioning creditors waived any question as to the accounts, and they were passed.

The petitioning creditors, who had not assented to the proposal, then claimed the right to examine the bankrupt under the 159th section of the *Bankruptcy Act*, 1861, with regard to his conduct; but the bankrupt refused to answer any questions on the ground that after the passing of the resolution nothing could be required of him as a condition of his order of discharge except the full discovery of his estate, which had been made. The Commissioner held that the bankrupt was bound to answer, and, on his refusal, made an order for his committal. From this order the bankrupt appealed.

Mr. *De Gex*, Q.C., and Mr. *Yate Lee*, for the Appellant:—

The good effect of the 110th section would be neutralized if the bankrupt were to be subject to the same examination as if he had come to no arrangement with his creditors. It was part of the agreement between them that all proceedings against him in bankruptcy should be at an end. If the creditors wish that the bankrupt should be still subject to examination, and possible punishment, they can provide for it in their resolution. In the absence of any such stipulation, if he makes a full disclosure of his estate he is entitled to his discharge: *Ex parte Jones* (1); *In re Carter* (2); *In re Tilston* (3). The only case which appears adverse to our view is *Ex parte McKerrow* (4); but in that case it was provided in the resolutions that the estate should be wound up as if it were being administered in bankruptcy.

Mr. *Bardswell*, for the opposing creditors, was not called on.

SIR W. PAGE WOOD, L.J.:—

I think the principle laid down in *Ex parte Mc Kerrow* is a sound one. The 110th section of the *Bankruptcy Act*, 1861, enables the creditors to come to an arrangement with the bankrupt, and proceeds, "and the bankrupt having made a full discovery of his

(1) 12 W. R. 221.
(2) Law Rep. 1 Ch. 170.
(3) Law Rep. 2 Ch. 199.
(4) 13 W. R. 1002.

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estate shall be entitled to apply for an order of discharge." If these last words had been omitted there might have been some foundation for the argument that everything connected with the bankruptcy was at an end. But, as the Lord Chancellor said in *Ex parte McKerrow* (1), "What the 110th section does is to enable the creditors to resolve that no further proceedings shall be had in the bankruptcy, and then the statute 'suspends' the proceedings, but, though it suspends them, leaving the administration of the property in the hands of the creditors, it expressly provides, in order that the creditors may not by their resolution prejudice the bankrupt, that when he shall have made a full disclosure of his estate he may do what if there had been no such resolution he might have done, that is, he may apply for his discharge. I see no ground whatever for supposing that because, *quoad* the administration of the estate, the bankruptcy has been suspended, therefore the bankrupt, as to what was to take place after, or independently of the administration, was intended to be put in a different position from that in which he would have been if the estate had been administered in the bankruptcy. It was argued that upon the construction adopted by the Commissioner the creditors, by their resolution, are putting the bankrupt in a position less favourable than he would have been if the bankruptcy had taken its ordinary course. He loses, it was said, his right to an allowance after he has obtained his discharge, and his right to an allowance in assisting his assignees to settle his documents. I give no opinion as to whether he does lose his right to an allowance, but if he does that does not lead to the conclusion that his right to a discharge is not to be inquired into. The powers given to the creditors to cease to administer the estate under the bankruptcy must have been founded on the assumption that they would be likely to know how the estate of the bankrupt could be best wound up. But why it had become necessary to wind it up at all, whether the insolvency was the result of reckless extravagence, fraud, or crime, or whether it arose from mere commercial misfortune, is a question altogether beside that of the best mode of administering the assets." I quite agree with these observations.

(1) 13 W. R. 1003.

The bankrupt contends that the administration is all at an end, that the creditors have accepted a composition, and that the Court has no more control over the assets. But what has that to do with the conduct of the bankrupt which led to the bankruptcy? It was said that it would be hard upon the sureties who had entered into engagements on the faith of the bankrupt being discharged. But all that can be said on that point is, that if it was intended that no inquiry should be made into the bankrupt's conduct, there ought to have been an express stipulation to that effect. And even if there had been, I think that, looking at the Lord Chancellor's opinion, it may be doubted whether, whatever may have been the creditors' wishes upon the subject, it would be right for the Court to give effect to such a stipulation. The question asked in the examination of the bankrupt related to his conduct before bankruptcy, and ought to have been answered. The appeal must be dismissed with costs.

SIR C. J. SELWYN, L.J.:—

The Act says the bankrupt may apply for his discharge. He says he was entitled to his discharge on making discovery of his estate, which he has done, and refers to the case of *Ex parte Tilston* (1). But I do not think that case is opposed to the conclusion at which the Commissioner has arrived. I think the meaning of the section is, that whatever discovery would be of any use is to be given. But here the bankrupt contends that he is not bound to submit to any examination at all. I think that *Ex parte McKerrow* (2) is conclusive, and governs this case. The appeal must be dismissed.

Solicitor for the Appellant: Mr. *W. W. Wynne.*
Solicitors for the Opposing Creditor: Messrs. *J. & R. Gole.*

(1) Law Rep. 2 Ch. 199.

(2) 13 W. R. 1002.

L. JJ.
1868
May 26.

MINTON *v.* KIRWOOD.

Marriage Settlement — Power, whether confined to Issue — Reference to Uses, whether it includes a Power — Enfranchisement to Cestui que Trust — Direction that Vendor shall convey.

By a marriage settlement, reciting only the intended marriage, and that it had been agreed that the lady's property should be settled and assured to the uses after mentioned, freeholds were conveyed to the use of the wife for life, remainder to the husband for life, remainder to such uses and upon such trusts as the wife should appoint, and in default of appointment to uses in favour of the issue of the marriage. The wife covenanted to surrender her copyholds "to the uses hereinbefore expressed" concerning the freeholds:—

Held, that the power of appointment was general, and could not be restricted to a power to appoint to issue. *Bristow* v. *Warde* (1) explained:

Held, also, that the covenant to surrender the copyholds to the same uses as the freeholds made the copyholds subject in equity to the same power of appointment as the freeholds, though powers were not expressly referred to in the covenant.

An appointee under the power was admitted to the copyholds, and obtained an enfranchisement to himself:—

Held, that the concurrence of the customary heir of the settlor was a question of conveyance, and not of title, for that the heir clearly had no beneficial interest.

In a decree for specific performance, a direction that the vendor shall convey has the same effect as a direction that the vendor and all other necessary parties shall convey.

Order of *Stuart*, V.C., affirmed.

THIS was an appeal by the Defendant, a purchaser, from an order on further consideration, directing specific performance.

On the 1st of June, 1848, *Susan Biggs* mortgaged freeholds in fee, and covenanted to surrender copyholds to the mortgagee.

By settlement, dated the 7th of June, 1848, made on the marriage of *Susan Biggs* with the Plaintiff, reciting the intended marriage, and that upon the treaty for the marriage it was agreed that the property therein mentioned should be settled and assured to the uses thereinafter declared concerning the same, *Susan Biggs* conveyed her freeholds (subject to the mortgage) to the use of herself and her heirs until the marriage, and after the marriage to the use of herself for life, remainder to the Plaintiff for life,

(1) 2 Ves. 336.

remainder "to such uses, upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoes, declarations, and agreements, and charged and chargeable in such manner, and for such estate and estates, interest and interests," as *Susan Biggs* should, by deed or will, appoint, and in default of appointment to the use of her children as tenants in common in fee. She also covenanted with *T. Worthing* to surrender her copyholds, "to hold the same unto the said *T. Worthing*, his heirs and assigns, to such and the same uses as are hereinbefore expressed and declared concerning the freehold hereditaments, or as near thereto as the nature and tenure of the property will admit."

The marriage was solemnized, and shortly afterwards, the wife having been admitted, the copyholds were duly surrendered to the mortgagee and his heirs, subject to redemption by the husband and wife, their heirs, suis, executors, or administrators. The mortgagee never was admitted. No surrender was ever made according to the covenant in the settlement.

Susan Minton (formerly *Biggs*) died in 1852, having previously made a will, by which she appointed the settled property to the Plaintiff and his heirs. In November, 1853, the Plaintiff was admitted to the copyholds, and in November, 1864, the lord of the manor, by deed, enfranchised them to the Plaintiff and his heirs, subject and without prejudice to the conditional surrender to the mortgagee. The mortgage was still subsisting.

The Plaintiff having contracted to sell to the Defendant the enfranchised copyholds, and he having taken objections to the title, the present suit was instituted. Vice-Chancellor *Stuart* made a decree for specific performance, with the usual reference as to title, and when a good title was first shewn, and with a declaration that the concurrence of *Susan Minton's* customary heir was not necessary (1). The Lords Justices, on appeal, varied the decree by striking out this declaration (2). The Chief Clerk certified that a good title had been shewn, and the Defendant moved to vary the certificate. The Vice-Chancellor refused the application, and made an order for completion of the purchase, only directing the vendor to convey, without the addition of the words "and all other necessary parties."

(1) Law Rep. 1 Eq. 449. 12 Jur N S 86.

(2) 12 Jur N S 970 3 H & N 358

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Mr. *Joshua Williams*, Q.C., and Mr. *Bristowe*, for the Appellant:—

The Vice-Chancellor clearly decided the case on an erroneous ground on the former occasion, it being quite impossible to hold that the mortgage gave the equity of redemption to the husband and wife as joint tenants: *Jackson* v. *Innes* (1). The husband had no legal right to admittance, and acquired no legal title by it: *Zouch* v. *Forse* (2); *Matthew* v. *Osborne* (3); *Steele* v. *Waller* (4). The heir has an outstanding legal estate, and *Wilson* v. *Allen* (5) does not shew the contrary. But we say he has also a beneficial interest. The power of appointment being in a marriage settlement ought to be construed as a power to appoint to issue only: *Bristow* v. *Warde* (6); *Cooke* v. *Briscoe* (7); *Mackinley* v. *Sison* (8); *Peover* v. *Hassel* (9). At all events, the title is too doubtful to be forced on a purchaser: *Pyrke* v. *Waddingham* (10). The legal estate remained in Mrs. *Minton*, the surrenderee never having been admitted: *Doe* v. *Tofield* (11); *Rex* v. *Mildmay* (12); *Doe* v. *Harrison* (13).

[The LORD JUSTICE WOOD referred to *Holdfast* v. *Clapham* (14).]

The copyhold subsists where the lord grants the freehold to a stranger: *Murrel* v. *Smith* (15); *Phillips* v. *Ball* (16); *Bell & Langley's Case* (17). No power was created over the copyholds, the covenant being only to surrender them to the "uses" declared concerning the freeholds; whereas where it is intended to create the same powers the form always used is "to the uses, and with, under, and subject to the powers, provisoes, and declarations," expressed and declared concerning the freeholds.

[*Bernard* v. *Minshul* (18), *Doe* v. *Bartle* (19), and *Hoddel* v. *Pugh* (20) were also referred to.]

(1) 1 Bli. 104.
(2) 7 East, 186.
(3) 13 C. B. 919.
(4) 28 Beav. 466.
(5) 1 Jac. & W. 611.
(6) 2 Ves. 336.
(7) 1 D. & Wal. 596.
(8) 8 Sim. 561.
(9) 1 J. & H. 341.
(10) 10 Hare, 1.
(11) 11 East, 246.
(12) 5 B. & Ad. 254.
(13) 6 Q. B. 631.
(14) 1 T. R. 600.
(15) 4 Rep. 24.
(16) 6 C. B. (N.S.) 811.
(17) 4 Leon. 230.
(18) Johns. 276.
(19) 5 B. & A. 492.
(20) 33 Beav. 489.

Mr. *Bacon*, Q.C., and Mr. *Blackmore*, for the Plaintiff, were asked whether they wished the question, whether the heir was a necessary party to the conveyance, to be argued at the present stage, and replied that they did not. They were accordingly not called upon.

SIR W. PAGE WOOD, L.J.:—

It may be unfortunate, but certainly, if so, it is entirely the fault of the Appellant, that the appeal should be presented in this stage. We are clearly of opinion that the concurrence of the customary heir, if necessary at all, is merely matter of conveyance, for that there is no such ground for a claim on his part to any beneficial interest as to make it reasonably arguable that his concurrence is a matter of title.

As regards the question of conveyance, nothing has been done which prejudices the Defendant. Originally there was, in the decree of the Vice-Chancellor, a declaration that the heir was not a necessary party to the conveyance, but, on appeal, that declaration was struck out, leaving only the common reference as to title, and an inquiry when a good title was first shewn. Under this decree a certificate was made that a good title had been shewn, and a motion to vary the certificate has been refused. A decree for specific performance followed as a matter of course. A decree was accordingly made that the Plaintiff should convey. It does not contain the words which are sometimes inserted, "all other necessary parties, if any," but that I take to be wholly immaterial, for the direction that the Plaintiff shall convey includes, in effect, the mortgagees and all other necessary conveying parties.

Now, all we have to consider at present is, whether that decree is wrong, and it appears to us that it is entirely right. The question whether the customary heir is a necessary party to the conveyance, if it is to be argued at all, must be argued at a later stage of the proceedings, and if the Defendant should suffer any inconvenience from being brought here a second time, he must remember that it will be owing to his having come here prematurely. I think, however, that he really came here because he wished to have the question of title argued. He distinctly raised upon his answer a question of title, namely, that *Susan Biggs* had

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no power to appoint the property as she did, and in that contention we are of opinion that he is entirely wrong.

The argument on behalf of the Defendant is two-fold, first, that as the deed was a marriage settlement, an intention to make adequate provision for children is to be inferred, and that therefore, according to the doctrine of *Bristow* v. *Warde* (1), large as the terms may be in which the power is granted, it must be cut down to a power to appoint to children only. Secondly, it is said that independently of that question, as the covenant to surrender the copyholds to the same uses as are declared of the freeholds does not refer to the same powers, provisoes, declarations, and agreements, as are contained with reference to the freeholds, no power of appointment is created as to the copyholds, for that the uses to be created under the power are not uses expressed concerning the freeholds in the deed creating the power.

Now, first, as regards *Bristow* v. *Warde*. Every case of course must turn upon its own facts, though there may be a general principle to be extracted from it. The decision in *Bristowe* v. *Ward* turned peculiarly upon the actual circumstances of that case, as I had occasion to observe in *Peover* v. *Hassel* (2), founding myself upon Lord *St. Leonards'* observations, which, of course, was more satisfactory to me than simply standing on my own judgment. It was considered by that noble and learned lord, and I concurred in holding, that *Bristow* v. *Warde* is not a case which can be considered as laying down the general principle—that in a marriage settlement you are to restrict the words of a general power in the manner in which they were there restricted. There they were restricted on account of the peculiar words used, which do not occur in the present case. In *Peover* v. *Hassel* I had to consider a much more difficult case than the present, because there the general power was to arise only in the event of there being issue, which, of course, if we were at liberty to indulge in conjecture as to the intention, would furnish a very strong ground for holding the power to be confined to issue. In the present case there is no such difficulty. The settlement simply recites that a marriage is intended to take place, and thereupon it is agreed that the property shall be settled and assured to the uses after men-

(1) 2 Ves. 336. (2) 1 J & H. 341.

tioned. It is settled to the wife for life, then to the husband for life, then comes the power, and there is nothing in the recital to lead to the inference that it was intended to be less extensive than its words import, and I cannot accede to the argument that it is to receive a different construction as regards the copyholds, for a covenant to surrender copyholds to the uses declared of freeholds cannot, in my opinion, be considered executory in the same sense as marriage articles and other agreements resting *in fieri*.

There being, then, a covenant that the copyholds are to be surrendered to the same uses as are expressed of the freeholds, let us look back to what the uses of the freeholds are, and it will be seen that it is a play upon words to say that the power is not included. The first limitation after the life estate of the husband and wife is to such uses and trusts as the wife shall appoint. Then the intention being that the copyholds shall go exactly in the same way as the freeholds, it is a correct and proper way of effectuating that intention to say that the copyholds shall be limited to such uses as are expressed of the freeholds, some of the uses expressed being such uses as *Susan Biggs* should appoint. Probably, in cases where there are numerous complicated powers taking effect by way of proviso in derogation of the uses limited, as, for instance, in the case of powers of sale and exchange, it is right, *ex majori cautelâ*, to refer expressly to the power, as is done in the common form referred to in argument. Here there is nothing but a continuous series of declarations of uses as to the freeholds, and to say that it is doubtful whether a covenant to surrender copyholds to the uses expressed of the freeholds includes the limitation to such uses as the wife should appoint, would, I think, be an abuse of the doctrine of the Court, which ought not to be pushed further than it has been, that the Court will not compel a purchaser to take a doubtful title.

The question, then, is reduced merely to a matter of conveyance, for we consider that the attempt to distinguish this case from *Wilson* v. *Allen* (1) wholly fails. Sir *T. Plumer* there says (2): "It is clear that the lord may, in general, convey the freehold of the land to a stranger; it is true that will not operate as an enfranchisement, because the act of a stranger cannot affect the tenure of the

(1) 1 Jac. & W. 611.

(2) 1 Jac. & W. p. 620.

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tenant, which is, therefore, not changed by the lord's parting with the freehold." But where the equitable owner has been admitted, and so is registered as the tenant of the lord, and an enfranchisement is made to him, the learned Judge says: "The trustee cannot then object and oppose the act of his *cestui que trust;* he cannot insist on keeping the copyhold alive, nor can he refuse to do whatever may be necessary to complete in point of form that which is already substantially done." In the present case, therefore, the customary heir, having no claim whatever to any beneficial interest in the property, cannot oppose, as against his *cestui que trust,* that which has here been done. It seems to us, therefore, that this is simply a question of conveyance and nothing else, and that, looking to all the circumstances of the case, the present appeal must be dismissed, and dismissed with costs.

SIR C. J. SELWYN, L.J.:—

It has been much pressed on us in this case that it would be a great hardship for the purchaser, on the fourth hearing of this matter, and on the second hearing before the Court of Appeal, not to have a determination of the real matter in controversy. Certainly, if that were a correct representation, I should be very unwilling to be a party to the infliction of any such hardship, but I think this subject may be looked at in two lights—with reference to substance and form. The only matter of substance is the question whether there is any beneficial interest in the heir of the settlor, or such a doubt as to the existence of that interest as can be considered an objection to the title? That is a question of substance, and upon that we express a clear and decided opinion.

I entirely concur in the opinion which has been expressed by the Lord Justice, that this is the case of an executed settlement not of an executory instrument. It is admitted to be entirely executed and completed as regards the freeholds, and so far as the copyholds are concerned, although it is true that something remains to be done by performing the covenant to surrender, yet as regards the declaration to uses the instrument is completely executed and settled, because all that has to be done is to insert in the surrender the same words that are used with reference to the settlement of the freeholds.

The argument, then, is reduced to the two points to which the Lord Justice has adverted. As to the question whether the settlement in its terms was controlled by the recital, it appears to me impossible to hold that where there is an agreement for a settlement, and that the property is to be settled and assured to the uses thereinafter declared, and you find there is first a limitation to the lady for her life, afterwards to the husband for his life, and then a general power of appointment given to the wife, and in default of appointment limitations to the children, and ultimately to the wife and her heirs—this is not a settlement; but that has really been the contention. I think it would, perhaps, be going too far to say, after the argument we have heard, that this is not an arguable question, but all I can say is, that the very able and learned argument which we have had the pleasure of listening to has convinced me that there is no substance whatever in the case which is sought to be put forward to establish the existence of a beneficial interest in the heir-at-law. I think that the other question which we are supposed now to leave undecided, viz.:—whether he is a necessary conveying party, is not a question that has yet arisen at all; and it would be going beyond the province of this Court if we were to speculate on the probability of some idle contention being raised on his part, and decide a question which may never arise, and can only arise by reason of his refusing to do what can do him no possible harm, viz., convey for the further satisfaction of the purchaser any interest which he may have. I think it is unnecessary to decide on the present occasion whether the heir has any legal estate or interest whatever; that may be a matter of considerable doubt, but I trust that the good sense of the parties will lead them to adopt such a course that it will not have to be raised.

I quite agree with the Lord Justice, that under the present circumstances the appeal should be dismissed with costs.

Solicitors: Mr. *Westall*; Messrs. *Tate & Jourdain.*

L. JJ.
1868
June 5, 6, 8.

TALBOT *v.* MARSHFIELD.

Trustees—Discretion—Power of Advancement—Trustees refusing Accounts and Information—Costs.

A power of advancement for setting up the children of the testator in business will not justify trustees in advancing the share of a married daughter for the purpose of paying her husband's debts.

But where a share was advanced for the purpose of setting up a married daughter in a farming business, her husband covenanting that the business should be for her separate use:—

Held, that this was a good execution of the power.

Where trustees had refused information and an account of the property to the Plaintiffs, who had an interest in the estate, and other proceedings had subsequently been taken whereby the costs of the suit were greatly increased, the trustees were directed to pay the costs of the suit up to the hearing, as if it had been an ordinary administration suit, and as to the rest of the costs each party to bear his own.

The decree of *Malins*, V.C., varied.

THIS was an appeal from a decree of Vice-Chancellor *Malins*. The case is reported (1).

The facts are fully stated in the previous report. It will be sufficient to refer to them shortly. *James Seymer*, of *East Stoke*, in the county of *Dorset*, miller, by his will, dated the 6th of March, 1845, gave and bequeathed all the property he should die possessed of to the Defendants *T. Randall*, a farmer, and *R. D. Marshfield*, a solicitor, upon trust to convert and invest the same, and to pay the interest to *Jane*, the testator's wife, during her life, and as to the residue of the proceeds of his estate, and also as to £1000 after the death of his wife, upon trust to pay the income in various proportions to his three sons, *Joelah Seymer*, *Moses Seymer*, and *Humphry Seymer*, and his three daughters, *Sarah Seymer* (afterwards *Sarah Ricks*), *Martha Seymer* (now *Martha Clarke*), and *Matilda Seymer*, for their separate use, during their respective lives, and after their deaths he gave the capital of these shares to their issue, and in case any of his said sons and daughters should die without issue, he gave his or her share to his (the testator's) grandchildren living at the decease of

(1) Law Rep. 4 Eq. 661.

such son or daughter. And the will then contained the following clause:—

"Provided always, and it is my will and desire, that if my said trustees or trustee for the time being shall, in their discretion, consider my said sons and daughters, or either of them, capable of managing, and that it would be conducive to their, his, or her interest to embark in or otherwise carry on any trade or business, then I hereby authorize and empower my said trustees for the time being to sell out or call in the whole or any part of the share or shares of the said principal moneys, stocks, funds, and securities, to a life interest in which such son or daughter, or sons and daughters respectively, shall or may be entitled under the provisions hereinbefore contained, and to transfer and pay over the produce of such share or shares unto the same son or daughter, or sons or daughters respectively, for setting them up in business as aforesaid, and the receipts of any such son or daughter respectively to my said trustees or trustee shall be sufficient discharges to them or him for the said produce, notwithstanding anything in this my will contained to the contrary."

The testator had seven children, namely, the six mentioned in his will, and also *Mary Jane Seymer*.

Humphry Seymer had died leaving a child. *Joelah* had not been heard of for many years, and his share was paid into Court under the *Trustees Relief Act*.

In the years 1850 and 1851, *Sarah Ricks*' share had been transferred to her to enable her to pay her husband's debts.

The interest of the shares of *Moses Seymer*, *Martha Clarke*, and *Matilda Seymer* was regularly paid to them from the testator's death until the year 1863, a period of fifteen years, at which time *Moses*, whose occupation had been that of a journeyman miller, was sixty-four years of age; *Sarah Ricks* was sixty-nine; *Martha Clarke* was sixty-five; and *Matilda Seymer* was forty-nine years of age.

In this state of things the correspondence relating to the suit commenced with a letter dated the 28th of August, 1863, from the solicitors of the Plaintiffs, who were the children of *Mary Jane Seymer*, to *Marshfield*, requesting information as to the interest of any of the Plaintiffs under the will. *Marshfield* did not make

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any satisfactory reply to this request, and the bill was filed on the 20th of June, 1864, asking for the common administration decree.

A correspondence then took place between the respective solicitors, in the course of which the trustees' solicitors offered the Plaintiffs' solicitors to give the accounts asked for if the suit was discontinued, and informing them that the Defendants—the trustees—intended forthwith to exercise the discretion reposed in them by the will, and pay to *Moses Seymer*, Mrs. *Clarke*, and *Matilda Seymer*, their share of the fund, and that, consequently, the only share in which the Plaintiffs would have any interest would be the share of *Joelah Seymer*.

The answer was filed on the 10th of August, 1864, in which the Defendants set forth the particulars of the property, and stated the advance to Mrs. *Ricks* in the years 1850 and 1851, and their intention of making similar advances to the other children.

On the 17th of November an application was made to Vice-Chancellor *Kindersley* for an order directing the Defendants to pay into Court the sum of £2346 10*s*. 2*d*., admitted to be in their possession. Upon that occasion *Marshfield*, *Martha Clarke*, and *Matilda Seymer* were cross-examined *vivâ voce*. *Marshfield* stated in his evidence, that it was proposed to set up these three children in the coal trade in partnership with a step-son of Mrs. *Clarke*. The Vice-Chancellor refused to order the money to be brought into Court, being of opinion that the trustees were acting *bonâ fide*, and that it was *Marshfield's* duty to see that the parties were capable of managing the proposed business; and His Honour declined to interfere with the trustees in the course they might think fit to take, but directed the motion to stand over till the hearing. The case is reported (1).

The project for setting up the three tenants for life in the coal trade fell to the ground in consequence of Mr. *Clarke* declining to take them into partnership upon the terms proposed.

A negotiation was then entered into to set up the same persons, not in the coal trade, but in partnership as farmers with the son of the co-trustee, *T. Randall*, and accordingly, on the 16th of February, 1865, the whole of the trust funds were sold out by the Defendants, and advanced to *Randall* the younger without any

(1) 2 Dr. & Sm. 285.

information of such intention being given to the Plaintiffs. The fund produced £2069 11*s.* 1*d.*, and after a deduction for costs, the sum actually paid over amounted to between £1700 and £1800.

After some other proceedings in the cause, the cause ultimately came on for hearing before the Vice-Chancellor *Malins*. His Honour was of opinion that none of the advances to the tenants for life were justifiable, and ordered all the money to be restored; and he directed the trustees to pay all the costs of the suit, with the exception of £200, which he fixed as the utmost probable costs if the suit had been an ordinary administration suit; and he directed the £200 to be paid out of the testator's estate. From this decree the trustees appealed.

Sir *Roundell Palmer*, Q.C., Mr. *J. H. Palmer*, Q.C., and Mr. *J. Napier Higgins*, for the Appellants:—

The trustees have acted throughout *bonâ fide*. Vice-Chancellor *Kindersley*, after careful investigation, was satisfied of this: the Court will not now interfere with their discretion. A power of this nature ought to be construed liberally. The testator meant the capital to be for the benefit of his children, and it was the duty of the trustees to advance it to them if they could find a reasonable mode of doing so, rather than to preserve it for the persons entitled in remainder. The farming business was better adapted for this family than the coal trade, which had been sanctioned by the Court. There was no reason why the advance should not be made to married women; the testator made no restriction of that nature. The trustees are accused of endeavouring to avoid accounting; but they had already accounted to those who were immediately interested, and they set forth fully in the answer all the particulars of the accounts: *French* v. *Davidson* (1); *Re Wilkes's Charity* (2); *Sillibourne* v. *Newport* (3); *Selby* v. *Bowie* (4); *Edwards* v. *Grove* (5); *Gresham* v. *Price* (6).

Mr. *Glasse*, Q.C., and Mr. *Dixon*, for the Plaintiffs:—

The advances by the trustees of the shares of Mrs. *Ricks* and Mrs. *Clarke* were not within the power. Being married women,

(1) 3 Madd. 396.
(2) 3 Mac. & G. 440.
(3) 1 K. & J. 602.
(4) 11 W. R. 606.
(5) 2 D. F. & J. 216.
(6) 35 Beav. 47.

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their business would be their husbands' business; and in the case of Mrs. *Ricks*, the money went at once to pay her husband's debts. With respect to the farming scheme, it was in itself rash and inexpedient. The children were not only aged, but infirm and incapable of managing it. The trustees entered upon it hastily for the mere purpose of defeating the Plaintiffs' claims. After the suit had been instituted, they were not justified in making any advances without the direction of the Court. They have throughout acted vexatiously, and have opposed all the Plaintiffs' efforts to obtain information: *Turner* v. *Turner* (1); *Costabadie* v. *Costabadie* (2); *Attorney-General* v. *Clack* (3).

Mr. *J. H. Palmer*, in reply, referred to *McLeroth* v. *Bacon* (4).

SIR W. PAGE WOOD, L.J.:—

This suit, which has been drawn out to an extraordinary length, might have been confined to an ordinary administration suit, for the matter is really a simple question on the construction of the power as applied to the circumstances of the advance. The bulk of the expense of the litigation has been occasioned by two causes —first, the default of the trustees in not giving at once the account which was asked for; and, secondly, the expensive manner in which it has been conducted, each side, apparently, being desirous of annoying the other as much as possible.

With respect to the first cause, the trustees having for some time abstained from making any advance under the trusts of the will, proposed to make an advance for the purpose of setting up some of the tenants for life in the coal trade. This gave rise to much suspicion, in great measure in consequence of the manner in which the trustees had kept the Plaintiffs at arms' length, and in great measure, also, in consequence of the style of the correspondence which subsequently took place. The desire of the Plaintiffs for information was so reasonable, that the Vice-Chancellor *Kindersley* himself said, that upon the answer he was not satisfied with the position of the trustees, and required them to put in an affidavit to justify their proceedings.

(1) 30 Beav. 414.
(2) 6 Hare, 410.
(3) 1 Beav. 467.
(4) 5 Ves. 159.

With respect to the two points which now arise on the construction of the power, we feel great regret, as the Vice-Chancellor felt, on being compelled, on the true construction of the power, to hold that the advances made in the case of Mrs. *Ricks* were not advances which can be justified by the power. We, therefore, leave that part of the decree untouched. I shall state my reasons for this conclusion presently.

But with regard to the other advancement, we are of opinion that it was executed *bonâ fide* in pursuance of the trusts of the power, and that the advances being actually made for carrying on the farming business were justifiable. We think that on that part of the case we are bound to vary the decree.

Then, with respect to the costs of this litigation. The Vice-Chancellor has ordered the whole of the costs to be paid by the Defendants to the Plaintiffs, except a sum of £200, and that sum he has directed that the Plaintiffs should have, at this stage of the cause, out of the testator's estate. We think, in the first place, that as the Plaintiffs have succeeded in setting aside only one of the advancements, and have failed as to the others, there ought to be no such direction as that contained in the decree, that the Defendants should pay the costs of the suit. Further than that, we should have thought it wrong, in any case, that at this stage of the cause, before the decree had been served on the other parties interested in the estate, the £200 should have been directed to be paid absolutely out of the testator's residuary estate. That is not the ordinary course of proceeding, and no doubt if it had been brought to the attention of the Vice-Chancellor it would not have been done. On the whole, having regard to our duty of protecting the testator's estate, and looking at the manner in which the litigation has been conducted, we have come to the conclusion that the Defendants should pay to the Plaintiffs the costs of the suit, including proceedings in Chambers, so far as it was a simple administration suit, which was the form in which the bill was originally filed; and then, looking to the protection of the personal estate and the benefit of the persons interested, we think it right that there should be no costs up to the hearing, on one side or the other, out of the estate.

I have now to give the reasons why we think it right that the

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Defendants should pay the limited costs I have spoken of:—[His Lordship then referred to the correspondence between the Plaintiffs' solicitors and the Defendant *Marshfield*, and continued:—] The Defendants say, that as an account had been settled in 1849, they thought it hard to be asked to give it again, and as the whole matter was very simple they set out in their answer, in about eight lines, those very particulars which they might just as well have set out in 1863 or 1864. If a trustee says his account is a simple one, there is all the less excuse for his not supplying it; I think there was no ground for the trustees declining to furnish the accounts, and their positive refusal to furnish them seems to me to have been the origin of all the mischief which afterwards happened. Afterwards, the common and proper bill was filed for an account, not setting out the correspondence, or attempting to fix the Defendants with the costs, but praying for an account and nothing more. [His Lordship then, after referring shortly to the correspondence which took place in the progress of the cause, proceeded to consider the points which arose on the construction of the will. After reading the principal clauses of the will His Lordship continued:—]

We must first look at the state of the family, because if this had been a common will of a testator leaving children who were only just of age, we might have thought this was only a power to advance to persons on their first entering into life, but it turns out that one of this testator's sons was forty-five or forty-six years of age at the date of the will, and that his daughters were between thirty and forty years of age. It appears to me, therefore, that the intention of the testator might be thus expressed:—The primary objects of his bounty are his own children; he makes them tenants for life, and he intends them, if the trustees think they are to be intrusted with it, to have the full benefit of the capital of their share, but he does not intend them to have it if they are idle people, and do not enter into business. And, as he foresees a danger that some contrivance may be devised for their going into business merely in order to get their money, he directs that the trustees must ascertain two things—first, whether, in their honest judgment, it would be conducive to the children's interest to embark in the business; and, secondly, whether, if they propose

to do so, they are capable of managing it, and he gives the entire discretion of ascertaining that to the trustees.

The first question raised was whether this power was proper to be exercised if any daughter married? It would be a strange construction of the will if we were to deprive a daughter if she married of the benefit of the devise. There is no reason why a married woman should not be set up in a farming business, and be able to superintend it, especially where, as was the case with these young women, she has been brought up on a farm, and has had the management of a dairy. Therefore to say that they could not possibly be advanced in business, seems to me putting the case much too high.

Then comes the question of advance to Mr. and Mrs. *Ricks*. That does stand in a very unfortunate position, because, although holding it to be quite competent to set up a daughter in business, we must not forget that the testator gave his daughters their incomes for their separate use. The money is to be laid out for their benefit. I think that we cannot say that the trustees are justified, when a daughter marries, in handing over money, not to set her up in business, but to enable her husband to go on with a business which he was carrying on at the time; it was, in fact, a simple loan to the husband. It became the husband's from that moment, and the consequence would be, that the testator's desire, which was evidently that of keeping it for the personal benefit of his children, and of having them started in some business in which they could occupy themselves, would be wholly and completely frustrated. I do not think that where there is such a personal power the case of *McLeroth* v. *Bacon* (1) would have any application. There the testator directed that the money might be paid for the "benefit of his daughter and her family;" and it was held that that expression would be satisfied by allowing the money to be applied in the purchase of a commission for the benefit of the husband. In the present case, the husband was in debt when he married. One part of the sum advanced went to pay the amount due for rent, and another to pay the tithes, and under those circumstances we cannot think that the advance, although made *bonâ fide*, was within the meaning of the testator's will.

(1) 5 Ves. 159.

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Then we come to the other advance as to which this unhappy contest has arisen:—[His Lordship then referred to the proceedings before Vice-Chancellor *Kindersley* with regard to the proposed advances to the three remaining children for the purpose of setting them up in the coal trade, and to the circumstances under which the negotiation was broken off and the fresh arrangement made for placing them in the farming business in partnership with Mr. *Randall*. His Lordship then continued:—] At first sight this transaction looks suspicious, but I think the evidence justifies what was done. Mr. *Randall* happened at that time to be separating from his brother, with whom he had been carrying on a farm in partnership. The farm was a good one, and the value given for it fair, and the sum brought in by the three tenants for life was a proper sum. Altogether it seems a reasonable and proper investment, if it was otherwise within the terms of the power.

As regards the terms of the power, the question is whether the children were capable of managing the business. Notwithstanding the age of *Moses*, he was able to see that the people on the farm did their work, and to manage the sales in the market, and the daughters were capable of managing the dairy. Then the trustees having ascertained that the children were capable of managing the business, and considering that it was conducive to their interests, why should the Court interfere with their discretion? With respect to the married women, the trustees acted, as I think, quite properly—they required their husbands to covenant that the property should remain to the separate use of their wives, and the business was to be carried on for their separate use. I do not see why it should not be carried on in that mode.

Another objection has been taken, that one of the children died very soon after the matter was concluded. But that would be no reason for setting aside the transaction unless we were convinced that there was a corrupt motive on the part of the trustees? In this case it is not easy to see what corrupt motive there could have been. The trustees could get no benefit to themselves.

But it is said that this was done to avoid an account. I think we must rely upon the judgment of Vice-Chancellor *Kindersley* for an answer to that objection. He had all the affair of the coal trade, which was much more suspicious than this, before him, and

the trustees and other parties were brought before him and cross-examined, and he was satisfied with the *bona fides* of the transaction.

Again, it is said that it was done out of spite. I hope it was not so, but if it was, it would be hard to say that these persons should not have the benefit they were intended to take under their father's will because the trustees acted out of ill temper. That is a suggestion which the Court cannot take into consideration.

SIR C. J. SELWYN, L.J. :—

This case has already occupied so large a portion of the public time that I shall compress the few observations I have to add within the smallest possible compass.

With respect to the advances made to Mrs. *Ricks* or to her husband, I think it sufficient to state that in my judgment those advances were not either within the letter or within the spirit of the proviso in the will.

With respect to the subsequent advances to the three children for the farming business, so far as the farming business itself is concerned, the evidence is all in favour of the advances, but there remain three questions; first, whether the trustees by their previous conduct had disqualified themselves from exercising the power vested in them by the will; secondly, whether they ought to have exercised it pending the suit; and, thirdly, whether that power is extended to the case of a married woman.

Now, the first and second questions have been, as it appears to me, in substance disposed of by the judgment of Vice-Chancellor *Kindersley*, in that which constitutes the most suspicious part of the case; all the accounts were brought before Vice-Chancellor *Kindersley*, and were the foundation of the cross-examination before him. The learned Vice-Chancellor pronounced a distinct opinion that there was no *mala fides* on the part of the trustees, and so far from considering that the trustees had done any act which incapacitated them from exercising the power, or that they ought not to exercise it pending the suit, the Vice-Chancellor expressly says that they are at liberty to go on exercising their own discretion just as they were doing the day before the bill was filed.

On this part of the case it is right to observe that, in considering

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the question of the conduct of the parties, it is immaterial whether the decision of the Vice-Chancellor was correct or not, for the expression of his opinion, whether right or wrong, delivered in the presence of the opposing parties, and after such an investigation of the case, is at least sufficient to justify the trustees exercising their own discretion, and that notwithstanding the pending of the suit, though of course it left it perfectly open to any one interested to question the mode in which that discretion had been exercised at any future time. It would, I think, have been more satisfactory if another course, which is a very obvious one, had been suggested by the Court and had been taken, that is, if the power had been exercised after some inquiry in Chambers as to the best mode of exercising it; but after what fell from Vice-Chancellor *Kindersley*, it is, I think, impossible to blame the trustees for exercising the power during the pendency of the suit.

With regard to the mode in which the power was exercised, and with respect to the question whether that power extends to married daughters or not, I do not think it necessary to add anything to what has fallen from Lord Justice *Wood*.

With respect to the costs of the suit, I think it right to say I agree with what was stated by Vice-Chancellor *Malins* as to the course frequently adopted by the late Lord Justice *Knight Bruce* in fixing a distinct sum for costs, and that course has frequently been found to be very useful in practice; but there never was a Judge who was more careful in protecting the rights of absent parties than Lord Justice *Knight Bruce*, and I very much doubt whether he would have made such an order as to costs as that which is now under appeal, and by which, on the hearing of an administration suit, £200 is ordered to be paid to the Plaintiffs out of the testator's estate. The improved practice of the Court obviates the necessity of bringing all the parties interested in the residue of the estate before the Court, but this very improvement, which has operated most beneficially in saving expense, renders it more incumbent for the Court to protect the interests of the absent parties. In the present case I think the other residuary legatees who were not present at the hearing would be entitled to be heard on the question whether the sum of £200 ought to be paid to the Plaintiffs for the costs of such a suit as this up to the hearing

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only. It is painful to see what an amount of costs has been incurred in this suit. Bearing in mind, on the one side, that even if an advance failed or became abortive, it was perfectly competent to the trustees to adopt another; and considering, on the other hand, that the trustees might have obtained the sanction of the Court in Chambers at a much less cost than they have sought to charge the estate with for the costs of their own proceedings, I think our duty is to protect the interests of the residuary legatees who have taken no part in these extremely costly and very unnecessary proceedings; and I think we shall discharge that duty, and also do justice between the parties who have indulged in these hostilities, by making such an order as that which has been pronounced by the Lord Justice; the effect of which will be, to leave the hostile parties to pay their own costs of the proceedings, and exonerate the general estate of the testator up to and including the hearing; and which will leave it open to the learned Vice-Chancellor to deal with the subsequent costs as the conduct of the parties and the justice of the case may require.

Solicitors for the Plaintiffs: Messrs. *C. & H. Bell.*
Solicitors for the Defendants: Messrs. *Lewis, Munns, & Co.*

In re UNIVERSAL BANKING COMPANY.

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May 25.

ROGERS' CASE.
HARRISON'S CASE.

Winding-up—Contributory—Acceptance of Shares, when conditional.

R. being desirous of being appointed local manager for a joint stock banking company, was informed by the agent of the company that it would be a condition of his appointment that he should take 100 shares. He accordingly filled up an application for 100 shares in the usual form, which the agent forwarded to the directors with a letter from himself stating that the application was made on condition of *R.*'s being appointed local manager. The shares were allotted to him, but in consequence of his not being able to pay the deposit the directors refused to give him the appointment:—

Held, that *R.*'s application for shares was conditional, and that he did not become a shareholder in the company.

H. being desirous of a similar appointment, made an application in the

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usual form for fifty shares, through the company's agent, but no letter was sent to the directors stating that the application was conditional on *H.* obtaining the appointment. The shares were allotted unconditionally to *H.*, who afterwards declined the appointment, but did not formally repudiate the shares:—

Held, that the application for shares was unconditional, and that he became a shareholder in the company.

Orders of *Stuart*, V.C., affirmed.

THESE were two appeals from orders of Vice-Chancellor *Stuart*, made in the winding up of the *Universal Banking Company, Limited.*

The directors of the company being desirous of establishing branch banks throughout the country, employed Mr. *Stillwrath* as their agent for that purpose. One of his duties was to procure suitable persons to act as local managers in the various towns in which banks were established. He had no power to appoint such managers, but only to negotiate with them. One of the conditions on which a manager was to be appointed was that he should take shares in the company proportioned to the importance of the town in which he lived.

ROGERS' CASE.

In October, 1865, Mr. *Stillwrath* had an interview with Mr. *James Rogers*, who resided at *Chester*, and it was arranged that he should be recommended as local manager for that city, at a salary of £200 a year, and that he should apply for 100 shares in the company, and pay a deposit of £250 on them, £125 of which was to be paid at once, and the rest by instalments out of his salary. *Rogers* signed an application for 100 shares in the usual form, and also a memorandum agreeing to pay a deposit of £125 on the 15th of November, 1865, and the remaining £125 by instalments on the 1st of May, the 1st of August, and the 1st of November, 1866.

Stillwrath forwarded this application and memorandum to the directors, accompanied by a letter from himself, stating that the application was conditional on *Rogers* obtaining the appointment.

These facts were established by *Stillwrath's* affidavit.

On the 28th of October the directors allotted 100 shares of £10

each to *Rogers*, and sent him a notice announcing the allotment, and requesting that he would pay the deposit of £125 "as arranged."

In November, 1865, *Rogers* came to *London* for the purpose of having his appointment confirmed, but in consequence of his being unable to pay the deposit, he was informed that he could not have the appointment.

On the 27th of December, 1865, he wrote to the *London* manager requesting to have his letter of application returned; but no reply was made to this letter, and his name was on the register in respect of the shares when the company was wound up in the month of June following. The Vice-Chancellor was of opinion, under these circumstances, that his application was conditional upon his being made local manager, and that his name ought to be removed from the list of contributories.

From this decision the official liquidator appealed.

HARRISON'S CASE.

In this case Mr. *Stillwrath* called on *Matthew Harrison*, who also resided at *Chester*, and urged him to become the local director of banks to be established at *Chester*, *Mold*, and *Wrexham*, at a salary of £300 a year; at the same time stipulating that, if appointed, he should take fifty shares in the company.

Stillwrath was not called as a witness in this case, but *Harrison* stated in his affidavit that *Stillwrath* drew up a letter addressed to the directors, stating that the taking of the shares was to be conditional upon *Harrison's* appointment of local director being made, and that they would not otherwise be taken. The letter was not, however, produced, and there was no evidence that any letter to this effect was actually sent to the directors. *Harrison* signed the usual application for fifty shares, which was sent up to the directors by *Stillwrath*. On the 29th of October the directors allotted *Harrison* fifty shares, requesting him to pay the deposit of £2 10*s.* a share on or before the 28th of November, 1865.

Harrison stated in his first affidavit, when the matter was heard before the Chief Clerk, that on the 3rd of November he wrote to

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the *London* manager that, "after mature and further consideration, he must decline the responsibilities and duties of the office proposed." In a subsequent affidavit, filed on the hearing before the Vice-Chancellor, he stated that he expressed in the letter great surprise at the unconditional allotment being made to him, and that he repudiated not only the responsibilities of the office, but the proprietorship of the shares.

Harrison paid no part of the deposit on the shares, and no demand was made for it by the company, but his name was on the register for the shares allotted to him when the company was wound up. Under these circumstances the Vice-Chancellor was of opinion that *Harrison* was properly on the list of contributories.

Harrison appealed from this decision.

Mr. *Swanston*, Q.C., for *Harrison* and *Rogers*:—

Harrison's case differs from *Rogers'* mainly in the evidence being less distinct as to the letter which *Stillwrath* undertook to write to the directors explaining that the contract was conditional. The Vice-Chancellor was satisfied with the evidence in *Rogers'* case, but the natural conclusion, from the evidence in *Harrison's* case also, is that the letter was sent. This is not the case of a collateral agreement, but the appointment of *Harrison* as local manager was the condition on which the application was made: *Coleman's Case* (1); *Shackleford's Case* (2); *Pellatt's Case* (3). As soon as *Harrison* found that the allotment of shares was made to him unconditionally, he repudiated them.

Mr. *Greene*, Q.C., and Mr. *Brooksbank*, for the official liquidator:—

We contend that in both cases the allottees ought to be upon the lists of contributories. The appointment to the office of local manager was no part of the contract. The application was unconditional, and there was nothing more than a parol negotiation with *Stillwrath*, who had no power to bind the company by any promise. In *Harrison's Case* there is no evidence that this negotiation was even communicated to the directors. With respect to the

(1) 1 D. J. & S. 495. (2) Law Rep. 1 Ch. 567. (3) Law Rep. 2 Ch. 527.

alleged repudiation of the shares by *Harrison*, it rests entirely on his second affidavit, which was filed after he knew the difficulties of his case, and must be received with suspicion: *Elkington's Case* (1); *Woollaston's Case* (2); *Felgate's Case* (3).

Mr. *Swanston*, in reply.

SIR W. PAGE WOOD, L.J.:—

With regard to *Rogers' Case*. It is one of the simplest character. The course of decisions has determined that to obtain a binding allotment there must be an application, an allotment, and a communication of the allotment. If, as in *Shackleford's Case* (4), there is a conditional application and an unconditional allotment, there is no contract. Apply this to *Rogers' Case*. Although *Rogers* signed an unconditional application, yet *Stillwrath* sent, with his application, a letter to the directors, stating that the application was conditional on his receiving the appointment. It is not necessary that the expression of the condition should be in the same letter with the application, provided they reach the directors together. *Stillwrath's* affidavit states the facts clearly, and he admits that he forwarded a letter to the effect I have stated; but, in reply, the directors made an unconditional allotment of the 100 shares. So that we have an application with a condition followed by an allotment without a condition, and, consequently, there was no contract concluded. It is not necessary to consider the question whether he repudiated the shares. He sets out the contents of a letter to that effect in his affidavit; but I think it is an objectionable practice to set out the contents of a letter in an affidavit without stating whether the deponent made a copy of it at the time, or how he remembers the contents. It is better to rely upon the evidence which I have stated, shewing that there was no complete contract for the shares.

As to *Harrison's Case*, the Appellant has not produced the evidence that *Rogers* has; in many respects the circumstances were much the same, but the evidence falls short in shewing that *Stillwrath* sent to the directors the letter as to the application

(1) Law Rep. 2 Ch. 511.
(2) 4 De G. & J. 437.
(3) 2 D. J. & S. 456.
(4) Law Rep. 1 Ch. 567.

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being conditional, which he did in *Rogers' Case.* In *Harrison's* first affidavit (and I may say here that it is safer to rely upon his first affidavit than on the second, which was made some time afterwards) he says that *Stillwrath* wrote a memorandum of the application being conditional, but he does not say that this memorandum was sent to the directors, or that he told *Stillwrath* to send it; and he does not subpœna *Stillwrath* as his witness, which he might have done. I therefore see in the case nothing more than an ordinary application followed by an unconditional allotment.

In *Pellatt's Case* (1) there was no communication of the allotment to *Pellatt,* and Lord *Cairns* relies upon this fact. Before any communication was made he revoked his bargain. In the present case, when the allotment is communicated to *Harrison,* he says, in his first affidavit, that he wrote on the 3rd of November, 1865, to Mr. *Richards,* the *London* manager, stating, that on mature consideration he declined the responsibilities and duties of the office. In his second affidavit, made after several months, he says that he felt great surprise at the allotment, and that he repudiated both the appointment and the share qualification. In the first affidavit he does not speak of any surprise, but, on the contrary, says that, after mature consideration, he repudiated the responsibility.

In truth it was his business to prove that there was a letter communicated to the directors containing a conditional application, and I do not see any cause for his not calling *Stillwrath* to prove this if it was the fact. As he has not done so, however unfortunate it may be for him, I think he has failed to establish his case, and the decision of the Vice-Chancellor must be affirmed.

SIR C. J. SELWYN, L.J. :—

Remembering the caution with which any Court ought to regard the statements of a witness in his own cause, I think that in *Harrison's Case* the Vice-Chancellor was justified in adopting the first affidavit, and if we take that as the correct statement of the facts it goes very far to settle the question.

It is said that his repudiation of responsibility referred to the

(1) Law Rep. 2 Ch. 527.

shares which had been allotted to him; but we must look to the state of circumstances at the time. He must have thought the shares would turn out well or he would not have applied at all.

It is said that *Stillwrath* was the company's witness; but the question is between *Harrison* and the other contributories, and it was competent for him to call *Stillwrath* as his witness. I agree with the Lord Justice as to *Rogers' Case*, and I think that the Vice-Chancellor was right in both orders.

Solicitor for the Official Liquidator: Mr. *Pulbrook*.
Solicitors for *Rogers* and *Harrison*: Messrs. *Chester & Urquhart*.

Ex parte PAIN. *In re* PAIN.

Bankruptcy—Order of Discharge—Effect on Claim of Provisional Assignee under previous Insolvency.

A debtor obtained his discharge under the *Insolvent Act*, 1 & 2 Vict. c. 110, after giving the usual warrant of attorney to the provisional assignee. He afterwards became bankrupt, and obtained his order of discharge under the bankruptcy:—

Held, that his after-acquired property remained liable to the claim of the official assignee for payment of his debts under the insolvency.

THIS was an appeal from an order made by Mr. *Hazlitt*, the Registrar sitting in the absence of Mr. Commissioner *Goulburn*, whereby he had ordered the Appellant to be committed to custody.

The Appellant, Mr. *W. H. B. Pain*, took the benefit of the *Insolvent Act*, 1 & 2 Vict. c. 110, and on the 7th of May, 1861, obtained his discharge under the Act, having executed the usual warrant of attorney to the provisional assignee, authorizing judgment to be entered up against him in respect of after-acquired property.

On the 14th of September, 1863, the Appellant was adjudicated bankrupt on his own petition, and obtained his order of discharge on the 15th of February, 1864. None of the debts due before the insolvency were proved in the bankruptcy.

In a suit of *Bellew* v. *Bellew* the Appellant was declared entitled, as one of the next of kin of the late Countess *Bellew*, to a share of

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her personal estate, and by an order of the Court of Chancery, dated the 3rd of August, 1867, the sum of £2250 consols was carried over to the account of the bankrupt and the provisional assignee.

On the 25th of April, 1867, judgment was entered up by the provisional assignee under the warrant of attorney, and on the 19th of December, 1867, Mr. Commissioner *Goulburn* made an order that the sum of £1577 11*s.* 1*d.*, being the amount of debts still due from the insolvent, should be paid out of the fund in Court to the provisional assignee. This order was discharged by the Lords Justices on the 24th of January, 1868, as irregular in form, without prejudice to any proceedings which might be taken before the Commissioner.

Applications were made to the Appellant to transfer sufficient part of the stock to satisfy the debts, to the provisional assignee, which he refused to comply with; and, accordingly, the provisional assignee applied for and obtained an order, under the 88th section of the 1 & 2 Vict. c. 110, that the Appellant should be committed to custody until he had made the transfer required. This was the order appealed from.

The Appellant appeared in person, and contended that his debts under the insolvency, as well as under the bankruptcy, were discharged by his order of discharge under the bankruptcy. He referred to the 1 & 2 Vict. c. 110, ss. 39 and 88; the *Bankruptcy Act*, 1861, s. 161; and to *Ex parte Clagett* (1), which he distinguished from the present case.

Mr. *Osborne*, Q.C., and Mr. *Reed*, for the provisional assignee, were not called on.

SIR W. PAGE WOOD, L.J.:—

The 87th section of the 1 & 2 Vict. c. 110, provides that the insolvent, before his discharge, must give a warrant of attorney to enable the provisional assignee to obtain execution against his future property for the benefit of his creditors; and then the 88th section goes on to provide that in case the insolvent, after his dis-

(1) 25 L. T. 120.

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charge, shall become entitled to any stock in the public funds, or other property which, by law, cannot be taken in execution under the judgment to be entered up under the warrant of attorney, and the insolvent shall refuse to transfer it, the Court may make an order for his committal to prison until he make such transfer; so that the insolvent cannot obtain his discharge except upon the condition of his making over all his future property of every kind for the benefit of his creditors. That is the principle of the Act, and it is clearly expressed.

The 161st section of the *Bankruptcy Act*, 1861, enacts that the order of discharge in bankruptcy shall discharge the bankrupt from all debts, claims, and demands proveable under the bankruptcy. He cannot be arrested or sued for any of such debts, and if he should be that section would be sufficient for his defence; but that has nothing to do with his property. That must continue to be applied in accordance with the *Insolvent Act*; for although that part of the *Insolvent Act* is repealed by the *Bankruptcy Act*, 1861, yet it is expressly provided by the 230th section of the latter Act that such repeal shall not affect "any proceeding pending, or any right that has arisen, or may arise, in respect of any transaction, act, matter, or thing done or existing prior to or at the commencement of the Act, under or by virtue of any of the Acts, or parts of Acts, repealed." I think there is no inconsistency in holding that the debtor is personally discharged from every demand upon him, but at the same time is bound to fulfil all the obligations incurred with respect to his property. I am therefore of opinion that the Appellant is bound to make over the fund in question to the provisional assignee; and the appeal must accordingly be dismissed.

SIR C. J. SELWYN, L.J.:—

The 87th section of the *Insolvent Act* is very carefully worded. The provisional assignee is not at liberty to take proceedings under the warrant of attorney on his own mere motion, but must come to the Court, who will decide if it is a case in which the warrant of attorney should be put in force; and, in the same way, under the 88th section, the official assignee must come to the Court for

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an order to compel the insolvent to transfer his stock, and the Court will take all the circumstances into consideration before making the order. It appears to me that, in this case, it is plainly just that this fund, which does not really belong to the insolvent until his debts have been paid, should be applied in payment of those debts, and as he has refused to transfer it for this purpose, and has taken a technical objection to the order made for payment of the debts by the provisional assignee, and has succeeded in this objection, the Court was right in making such an order as has been made in this case. The appeal must therefore be dismissed, with costs.

Solicitors for the Provisional Assignee: Messrs. *Walker, Twyford, & Belward.*

L. JJ. 1868 *June* 12.

Ex parte GRAVES. *In re* PRINCE.

Bankruptcy—Composition Deed—Prisoner in Custody for Offences against the Copyright Act—Discharge.

A debtor was convicted under the 6th section of the *Copyright Act* (25 & 26 Vict. c. 68), for violations of copyright in engravings, and sentenced to pay a fine, and in default was imprisoned. After the conviction he executed a deed of composition with his creditors, which was duly registered. He then applied for discharge from prison:—

Held, that the process under which the debtor was arrested was of a criminal nature, and not for a debt, and that he was not entitled to his discharge.

THIS was an appeal from a decision of Mr. *Hazlitt*, the Registrar in Bankruptcy, sitting in the absence of the Commissioner, in the matter of *W. B. Prince*, a printseller in London. On the 15th of May, 1868, nineteen summonses were taken out by Mr. *G. H. Graves* against *Prince*, to recover penalties for violation of his copyright in certain engravings of which *Prince* had sold photographs (1). The summonses were heard on the 16th of May before the magistrate, who convicted *Prince* on all of them, and imposed on him a penalty of £5 for each offence: and in default

(1) See 25 & 26 Vict. c. 68, s. 6.

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of payment sentenced him to fourteen days' imprisonment for each offence (1).

Before the summonses were heard, a deed of composition, bearing date the 16th of May, 1868, had been prepared, by which *Prince* covenanted to pay his creditors 2*s.* in the pound, and they released him from all his debts. While the magistrate was giving judgment, and, in fact, after the sentence for two of the offences had been pronounced, *Prince* executed the deed. The deed received the requisite number of assents, and was registered on the 20th of May. On the 1st of June *Prince* applied to the Registrar, sitting in the absence of the Commissioner, for his discharge from custody under the 112th section of the *Bankruptcy Act*, 1849, on the ground that he was not in custody for any criminal offence. The Registrar ordered his discharge, and *Graves* appealed from this decision.

Mr. *Sargood*, for the Appellant:—

The debtor is not in custody for a debt under civil process, but has been imprisoned for a violation of the law which is in the nature of a criminal offence. The 6th section of the *Copyright Act*, 25 & 26 Vict. c. 68, under which *Prince* was convicted, calls the infringement of copyright of which he has been guilty an "offence," and enacts that "such person for every such offence shall forfeit to the proprietor of the copyright for the time being a sum not exceeding £10." It is true that the penalty is paid to the proprietor of the copyright, but it is imposed as a punishment for a violation of the law. Then the 6th section of the *Small Penalties Act*, 28 & 29 Vict. c. 127, under which *Prince* was imprisoned, provides that "the Act shall apply to penalties, including costs, recoverable in a summary manner in pursuance of any Act of Parliament." The point has been decided in *Ex parte Johnson* (2), and a similar point has been decided by the Queen's Bench, on a conviction under the *Act for the Relief of the Poor*, 43 Eliz. c. 2, in *Bancroft* v. *Mitchell* (3). A clear distinction is taken in the *Copyright Act* between the offence against the law and the injury to the individual, for the proprietor, besides receiving the

(1) See 28 & 29 Vict. c. 127 (*Small Penalties Act*).

(2) 15 L. T. (N.S.) 163.

(3) Law Rep. 2 Q. B. 549.

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penalty, may recover damages in a civil action against the offender (sect. 11.)

Mr. *Reed*, for the Respondent:—

The Respondent was not imprisoned for a criminal act, but for non-payment of the penalty. It is in the nature of process of contempt for non-payment of money ordered by the Court. If a heavier penalty than £5 had been imposed the offender could not have been imprisoned under the *Small Penalties Act*. In that case the injured party must have had recourse to a civil process to recover them, and the offender would be released from them by the composition deed. So that, according to the construction contended for by the other side, if the penalty is a heavy one the offence is merely a civil injury; if the penalty is under £5 the offence is a criminal act. [He referred to *Marks* v. *Hall* (1).]

SIR W. PAGE WOOD, L.J.:—

The case of *Bancroft* v. *Mitchell* (2), has thrown great light on the construction of the provisions of the sections referred to. The *Copyright Act* clearly makes that which the debtor has done an offence against the law. This is made plain by the 7th section, in which there is a distinct prohibition of certain acts which are of the same nature as those which he has committed—they are stigmatized as fraudulent, and for such offence a penalty is to be paid; and then, by the 8th section, it is declared that all pecuniary penalties imposed under the Act shall be recovered in the manner there pointed out. Then follows the 11th section, which is not mentioned in the learned Registrar's judgment, by which it is enacted that in addition to the penalties the person injured may recover damages in an action on the case at law.

The scope of the statute throughout is to make the act done an offence; the penalty is to be paid to the person injured, but it is not to be the measure of the damages which he may recover, for he may bring his action and recover damages independently of the penalty.

Then comes the *Small Penalties Act*, which expressly refers to

(1) Law Rep. 2 Q. B. 31. (2) Law Rep. 2 Q. B. 549.

the penalties in pursuance of any Act of Parliament—words which clearly include penalties under the *Copyright Act*. It provides in sect. 4, that "where upon summary conviction any offender may be adjudged to pay a penalty not exceeding £5, such offender in case of non-payment thereof may, without any warrant of distress, be committed to prison for any term not exceeding the period specified in the following scale." That answers Mr. *Reed's* argument, that according to the Appellant's construction if the penalty were to be higher than £5 it would be simply a debt, for the effect of the Act is, that if the penalty be under £5 there is no necessity for a previous distress; but yet if it is over £5 the Act does not interfere with the power of imprisonment after a previous distress.

The Judges have thrown great light on the construction of the Act by their judgments in *Bancroft* v. *Mitchell* (1). There the question was of a very similar character, and in his judgment *Blackburn*, J., says (2):—"The statute makes what was a duty of imperfect obligation a positive duty. . . . The offence here is, that the Plaintiff being of ability would not support his impotent relative—that is a duty the neglect of which, though only morally wrong before the statute, is made a crime by the statute. It seems to me, therefore, that the commitment is not in the nature of civil but of criminal process, to punish the Plaintiff for not performing the duty imposed on him by statute. It is quite true that on payment of the money he would get off the imprisonment; but still it is in the nature of criminal process, and consequently the Plaintiff was not entitled to his discharge." I think, therefore, that the argument that the debtor escapes by paying money, and therefore the imprisonment is only a process to enforce payment of money, is answered by Mr. Justice *Blackburn's* judgment. Another answer to the same argument is, that there is the other process against him for damages. The imprisonment is the real punishment for the offence, but he can get off by paying the penalty. Whether the penalty would be proveable or not under the bankruptcy of the prisoner makes no difference, but I hardly think that the Appellant could now prove after having allowed him to be imprisoned for non-payment of it. I am of opinion that the Respondent is not entitled to his discharge.

(1) Law Rep. 2 Q. B. 549. (2) Law Rep. 2 Q. B. 555.

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SIR C. J. SELWYN, L.J.:—

It appears that *Bancroft* v. *Mitchell* (1) was not cited to the Registrar. In that case *Mellor*, J., says, speaking of the duty of a son to support his mother, which was made a positive duty by the statute:—"The ultimate enforcement of that duty is carried out by fixing a penalty, and in the event of the non-payment of that penalty a punishment of not more than three months' imprisonment is imposed. That is in the nature of a punishment for a criminal offence. It is not at all analogous to the case of an indictment for disobeying an order of sessions for the payment of poor rates, nor to an attachment for non-payment of money pursuant to the order of the Court of Chancery, where the process is in the nature of an execution for a debt."

Whether we take the letter or the spirit of the Act the result is the same. If we look at the letter the words used are "penalty" and "conviction," all pointing to a criminal offence. If we look to the spirit of the Act we find certain acts prohibited and treated as offences, and certain penalties imposed, and in addition to the penalty the prosecutor may recover damages by action. The application for discharge must be dismissed with costs. There will be no costs of the appeal.

Solicitors: Messrs. *Lewis & Lewis*; Mr. *C. A. Pullen*.

L. JJ. 1868 *June* 24.

ST. AUBYN *v.* SMART.

Partnership—Liability of one Partner for Money received by his Co-partner—Solicitors—Fraud—Jurisdiction.

The Plaintiff being entitled to a fund in Court, gave the firm of solicitors who had acted for him in the matter a joint and several power of attorney to receive the money from the Accountant-General. The Plaintiff sent the power to *B.*, one of the partners, who received the money, and signed the receipt in his own name. *B.* paid the money into his own private banking account, and shortly afterwards absconded with it. The letters on the subject of the power of attorney, and the cost of stamping it, were charged for in the bill of costs of the firm. Upon a bill seeking to make S., the other partner, liable to repay the money, but not praying for an account:—

Held (affirming the decree of *Malins*, V.C.), that the money must be treated

(1) Law Rep. 2 Q. B. 549.

as having come into the hands of the firm in the course of their business as solicitors; and that *S.* was liable for its repayment with interest:

Held, also, that the Court had jurisdiction to give relief, though the bill did not pray for an account, both under its general jurisdiction over solicitors and because *B.* had been guilty of fraud.

THIS was an appeal from a decision of Vice-Chancellor *Malins* (1).

The Plaintiff, Mr. *Lionel St. Aubyn*, an officer in the army, was entitled in the year 1858 to a share of a fund which had been paid into Court in an administration suit. In that year a Petition was presented to the Court, upon which an order was made for payment of his share out of Court. On this Petition the Plaintiff's solicitors were the firm of *Smart & Buller*, of which the Defendant *Smart* was a partner. It appeared that *St. Aubyn* had been introduced to the firm by one of his family, not having known either of the partners before. It being necessary that the Plaintiff, who was stationed at *Malta*, should execute a power of attorney to enable his solicitors to receive the money, *Buller*, one of the firm, wrote to him a letter dated the 2nd of July, 1859, inclosing him a receipt for certain interest which was due to him, and also a power of attorney to receive the balance of money in Court. The letter contained the following passage:—

"The money coming to you will be, for principal, £582 3*s.* 6*d.*, and for balance of interest, £38 3*s.*; total, £620 6*s.* 6*d.* Mr. *Chauntler* begs me to remind you that there is due to him for money advanced to you in August and September, 1857, £25; interest, £2 2*s.* 6*d.*; total, £27 2*s.* 6*d.* This will have to be deducted from the £620 6*s.* 6*d.*, as will also your share of the costs of the deed of arrangement with your mother. The amount of them is not yet ascertained. The power of attorney requires to be signed and witnessed exactly in the same way as the deed which I sent you before. If you will be so good as to have the documents properly executed, and return them to me with your directions how I shall dispose of the money, I will receive it and pay it according to your instructions." The letter was signed by *Buller* in his own name, and not in that of the firm.

The power of attorney was to Messrs. *Smart & Buller* jointly

(1) Law Rep. 5 Eq. 183.

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and severally. The Plaintiff returned it duly executed, and with it wrote a letter, dated the 16th of July, 1859, to *Buller* in the following terms:—"I yesterday received your letter. I shall be greatly obliged if you will place in *Cox's* hands for me £220 directly; the rest please keep for me till I see you, as I hope to be in *England* shortly," &c.

Under this power of attorney *Buller* alone received the money, amounting to £582 3*s.* 6*d.*, from the Accountant-General, signed the receipt in his own name, and paid the money into his private banking account, from which he shortly afterwards drew it out, and absconded to avoid his creditors.

The bill of costs in relation to the Petition and the receipt of the money, including an item for drawing request for power of attorney for receipt of principal money payable to the Plaintiff, and the expense of stamping the power, was made out in the name of the firm, and the taxed amount received by the Defendant *Smart*.

It was admitted that the Defendant had not actually received the money; but the Plaintiff, by his bill, charged that it was received by the Defendant's partner in the ordinary course of business, and prayed that the Defendant might be declared answerable for the sum so received, and might be ordered to pay the same to the Plaintiff with interest; but no account was asked for.

The Vice-Chancellor, under the circumstances, was of opinion that the Defendant was responsible for the default of his partner, and granted the relief prayed. The Defendant appealed.

Mr. *Cotton*, Q.C., and Mr. *Smart*, for the Appellant:—

Receiving money is no part of the ordinary business of a solicitor, and therefore the partner of a solicitor receiving the money of his client is not responsible for its misapplication. The Plaintiff corresponded with *Buller* individually, and by sending the power of attorney to him, he put it in his power to receive the money without the knowledge of his partner. Having trusted one partner solely, he cannot now make the other liable as though he had trusted the firm: *Bourdillon* v. *Roche* (1); *Harman* v. *Johnson* (2); *Bishop* v. *Countess of Jersey* (3); *Viney* v. *Chaplin* (4).

(1) 27 L. J. (Ch.) 681.
(2) 2 E. & B. 61.
(3) 2 Drew. 143.
(4) 2 De G. & J. 468.

The Plaintiff's remedy is at law, not in equity. No account is prayed; it is simply a case of an action for money had and received. In *Atkinson* v. *Mackreth* (1) an account was prayed. There is no fraud, as in the case of *Blair* v. *Bromley* (2).

Mr. *Glasse*, Q.C., and Mr. *G. O. Edwards*, for the Respondent, were not called on.

SIR W. PAGE WOOD, L.J.:—

The case stands thus. The Plaintiff was entitled, as the result of proceedings in Chancery, to £582 3*s.* 6*d.*, as his share of the principal of a legacy, and also to £38 3*s.* for interest, amounting together to £620 6*s.* 6*d.* The £582 3*s.* 6*d.* being in Court, could not be got out without his authority, and his solicitors write him this letter, which is charged for in the bill of costs of the firm of *Smart & Buller*, and therefore must be taken to have been written by the firm:—[His Lordship read the letter of the 2nd of July, 1859.] We also find that the Plaintiff is charged with the letter bespeaking the power of attorney as having been written by the firm. The power of attorney makes the two partners jointly and severally attorneys to receive the money—it can have been given to them in no other character than as the Plaintiff's solicitors. It is immaterial in such a case whether the receipt of the money was or was not in the ordinary course of their business as solicitors. The money was received by *Buller* with the knowledge of his co-partner. The two partners had agreed to do a particular thing. We need not consider what would have been the result if the thing had been done by one partner without the knowledge of his co-partner. This makes the case very different from *Bourdillon* v. *Roche* (3), and *Harman* v. *Johnson* (4).

Then the Plaintiff replies by a letter of the 16th of July, 1859:—[His Lordship read the letter.] Here there was no disagreement on the part of the Plaintiff to deduct the costs from the money coming to him; but he returns the power of attorney to the firm, and he asks the firm—for I must still consider that he was dealing with the firm—to pay £220 to his agents, and to keep the balance

(1) Law Rep. 2 Eq. 570.
(2) 2 Ph. 354.
(3) 27 L. J. (Ch.) 681.
(4) 2 E. & B. 61. 17 Jun 1096

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in their hands. Instead of doing this the firm pays the money to *Buller's* private account. Then it first passes out of the hands of the firm, and therefore interest on it is rightly made payable from that time. I am of opinion that the Vice-Chancellor is right in holding that the money having been in the hands of the firm, each of the partners is responsible for it.

It is, however, said that the Plaintiff's remedy is at law, and not in equity. I think this Court has clear authority to call a solicitor to account for a sum of money which has passed into his hands as the result of proceedings in Court. If the liability is not disputed, a simple petition is sufficient. If the responsibility is disputed, and a bill is found necessary, the jurisdiction of the Court is no less clear. But here there is the additional fact that there is a distinct undertaking on the part of the firm to apply the money in the manner directed. It is a fraud of one partner, for which the other is liable. The case, in this respect, is not to be distinguished from *Blair* v. *Bromley* (1). The appeal must be dismissed with costs.

SIR C. J. SELWYN, L.J. :—

I do not think it necessary to add much to what the Lord Justice has said. The names of both partners were inserted in the power of attorney, and they are there described as "both of *Lincoln's Inn Fields*, Gentlemen." It is quite clear that they were to receive the money as the Plaintiff's solicitors.

But, in addition to this, in the bill of costs which was made out after *Buller* absconded, there are charges made by the Defendant *Smart* for bespeaking the power of attorney, for receiving it back, and for getting it stamped. On these facts, the case may be fairly decided on the very authorities relied on by Mr. *Cotton*, *Bourdillon* v. *Roche* (2), *Harman* v. *Johnson* (3), and *Bishop* v. *Countess of Jersey* (4); without having recourse to any authorities on the other side. For the simple question is, whether the proof of the privity and knowledge of the partner who is charged, which was absent in those cases, is to be found in this. It is impossible to say that the Defendant had not full knowledge of the receipt of the

(1) 2 Ph. 354.
(2) 27 L. J. (Ch.) 681.
(3) 2 E. & B. 61.
(4) 2 Drew. 143.

money by his co-partner. I therefore agree that the appeal must be dismissed with costs.

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Solicitors for the Plaintiff: Messrs. *Chauntler & Crouch.*
Solicitor for the Defendant: Mr. *J. Smart.*

In re LONDON AND MEDITERRANEAN BANK.
Ex parte BIRMINGHAM BANKING COMPANY.

L. JJ. 1868 *July* 2.

Liquidators—Signature—Authority—Companies Act, 1862, *s.* 133—*Claim.*

The four liquidators of a company resolved that one of them should have power to accept bills:—

Held, that this, as a general authority, would not be sufficient under the *Companies Act*, 1862, which requires the signature of two liquidators, but that the four liquidators might authorize any one to sign any particular bill.

Bills accepted by one liquidator, in pursuance of this resolution, were held to be invalid against the company, but the holders of the bills were allowed to claim as creditors for money advanced.

Order of *Stuart*, V.C., reversed.

AT an extraordinary meeting of the *London and Mediterranean Bank, Limited*, held on the 22nd of November, 1865, resolutions were passed for winding up the company voluntarily, and Messrs. *Maxwell, Routh, Collins, & Schoales*, were appointed liquidators. At the first meeting of the liquidators, held on the 24th of November, at which all four liquidators were present, a resolution was passed by them that the bankers of the company be requested to honour all cheques or drafts bearing the signature of one of the liquidators, manager, or secretary, countersigned by the accountant or one of the cashiers of the company, and that the bank's acceptances should continue to be signed by one of the liquidators and by the manager, as theretofore.

The *Birmingham Banking Company* were the holders of five bills of exchange, drawn at different dates since the winding-up, and by different persons, and each accepted by one of the four liquidators and the manager "for the *London and Mediterranean Bank, Limited*, in liquidation." The *Birmingham Banking Company* claimed to be creditors for £4667 10*s.*, in respect of these five bills.

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The liquidators had been changed since the bills were accepted, and the present liquidators disputed the claim of the *Birmingham Banking Company*, on the ground that the bills had been accepted by one liquidator only instead of two, as required by the *Companies Act*, 1862 (1); power to accept bills being given by the 95th section of the Act.

It appeared that the original liquidators had passed a resolution that bills to the extent of £16,500 should be issued to a Mr. *Dimsdale*, and Mr. *Dimsdale* seemed to have taken these five bills of exchange, and to have got them discounted. There was a dispute as to whether these bills were issued for the purposes of the liquidation, or for other purposes, as to which some evidence was entered into.

The Vice-Chancellor *Stuart* was of opinion that the *Birmingham Banking Company* had established their claim, and he made an order that their claim *in respect of the said five bills of exchange* should be allowed.

The official liquidators appealed.

Mr. *Bacon*, Q.C., and Mr. *J. N. Higgins*, for the Appellants:—

We rely on the statutory requisitions, and contend that these bills are invalid, as being signed by one liquidator only. The company at the meeting could authorize one liquidator to act, but the liquidators could not. It is clear on the face of the bills that the company was in liquidation, and any one taking them is bound to know that one liquidator could not bind the company. There is no distinction between this case and the case of a claim by the *London and South Western Bank* against this very company, where the Vice-Chancellor decided against the claim.

Mr. *Swanston*, Q.C., and Mr. *Lindley*, for the *Birmingham Banking Company*:—

Our claim is that of creditors holding these bills as security. We advanced the money, and took the bills signed by one liquidator. There is nothing in the Act to make such an acceptance

(1) 25 & 26 Vict. c. 89, s. 133, rule 6. "When several liquidators are appointed, every power hereby given may be exercised by such one or more of them as may be determined at the time of their appointment, or in default of such determination by any number not less than two."

invalid: *Lord* v. *Hall* (1). It does not signify who actually signs the bills if the signer has the authority of all the liquidators. A clerk may sign: *Ex parte Sutton* (2). The Vice-Chancellor *Stuart* was of opinion that we had advanced this money; and the words as to the bills of exchange must have been inadvertently introduced into the order.

Mr. *Higgins*, in reply.

SIR W. PAGE WOOD, L.J.:—

The point now before us is this, and it does not seem to be unimportant to the liquidators of the *Mediterranean Bank:* namely, whether the proof should be upon the bills, or upon the debt?

Now, as regards the claim upon the bills, the case stands in a very small compass, and it is this:—According to the Act, liquidators, when they are in the plural number, cannot perform any act except there be two at least engaged in the performance of that act, unless they have authority from the company appointing the liquidators to perform it in any other manner—as, for example, through the medium of one liquidator. Then the 95th section gives power to liquidators to accept bills of exchange which shall bind the company. That power is simply a statutory power; and the liquidators have no power whatever, except by the statute, and of course, therefore, that power must be exercised as the statute directs: that is to say, the liquidators in this case have no power to accept bills, except through the medium of two, at least, of them.

I am disposed to accede to the very able argument of Mr. *Swanston* and Mr. *Lindley*, and I am not at all inclined to dispute their proposition, that the authority of the two does not necessarily mean that you should find the names of the two liquidators on the piece of paper which forms the bill. But though the liquidators might well meet (the four liquidators are said to have done so here) and give an authority to some one, yet that must be as to the acceptance of a specific bill, or other specific thing which is to be done; and they may then say that their clerk or agent,

(1) 8 C. B. 627. (2) 2 Cox, 84.

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whoever it may be, shall sign for them; or, it may be, impress a printed mark, which may be taken to be their signature. That may be a good acceptance under the 95th section; but at least you must have the judgment of the two liquidators upon the particular bill which they authorize to be so signed; and I apprehend that a general resolution that all these bills should be signed in a particular way could go no further than Mr. *Lindley* put it, that when they have exercised their judgment, and desired that a particular bill shall be accepted, that shall be the way in which it shall be done. [The Lord Justice then commented on the evidence, and continued:—] The grant of a sweeping authority to issue bills, altogether to the extent of £16,500, without any judgment exercised as to the date at which they are to be issued, the proportions in which they are to be issued, the amount of the bills, or the times during which they shall run, except this, that there are to be three months from the date, whenever that may be, does not appear to us an act which it was competent to the four liquidators to do in the manner proposed by their resolution.

As regards the holders of the bills, it may be said that they are placed in a disadvantageous position, in being affected by any of these regulations with reference to the acceptance of bills; but I apprehend that the holders of the bills must be bound by the statute. It may always be a question how far they are bound by the private regulations of the company's deed, but here is an express provision in the statute which tells them that a single liquidator cannot accept—that is to say, he cannot be the person authorizing an acceptance. Therefore, if the holder finds on the face of the bill no trace of the requisite authority, it is his own fault if he takes a bill of that description, and the *onus* is then thrown upon him of shewing that the statute has been complied with. We think that that *onus* has not been in this case discharged, and that the decision of the Vice-Chancellor in the case of the *London and South Western Bank* was a perfectly correct decision on the circumstances there stated, which seem to have been very similar in substance to the circumstances here. Our order will be wholly without prejudice to the question whether or not the claimants are entitled to recover the money which may have been advanced to the bank at the instance of the liquidators:

That is quite another question, but the order of the Vice-Chancellor, in its present form, cannot stand, and will be discharged. All we do is to discharge the Vice-Chancellor's order, without prejudice to any proof that may be made by the *Birmingham Bank* in respect of moneys advanced to the bank in liquidation; the liquidators to have their costs of this appeal out of the estate; and the costs of the Respondents of this appeal to depend upon the result of the proof they may offer in respect of the moneys advanced.

SIR C. J. SELWYN, L.J.:—

There are two questions in this case. First, upon the bills of exchange; and, secondly, upon the claim in respect of that money which was actually paid by the *Birmingham Bank*, and which it is said was, in fact, applied for the benefit of the *Mediterranean Bank*.

On the first question I agree with the Lord Justice that there has not been in the case such an exercise of judgment and discretion by two or more liquidators as is required by the Act of Parliament.

The second question, as to the money, resolves itself into a question, not upon the real merits of the case, but whether the liquidators of the *London and Mediterranean Bank* ought to have time to answer the second branch of the claim of the *Birmingham Bank*. Looking at the original claim, and the evidence upon which it was supported in the course of the argument in the Court below, I think it is impossible for us, at this stage of the proceedings, to refuse the liberty asked on behalf of the liquidators, to answer the claim so made on behalf of the *Birmingham Bank*. The *Companies Act* gives great facilities to parties to bring their cases speedily before the Court, without any process of pleading, or delay, or material expense. But the very laxity which the Act of Parliament allows, requires, on the other hand, all parties, as far as possible, to concur in bringing before the Court, at the earliest possible moment, the real questions in the case; and it is very lamentable in this case that the matter should be brought before the Court of Appeal in such a manner that we cannot decide on the real merits. Here it is said that it is desired to offer

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evidence on the second claim, and I think, having regard to the mode in which it is brought forward on the other side, it would not be just to refuse that application. I concur, therefore, in the order which the Lord Justice has suggested, making the costs of the present Respondents depend upon the result.

Solicitors for the Liquidators: Messrs. *Lewis, Munns, & Co.*
Solicitor for the *Birmingham Banking Company:* Mr. *Stuart.*

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KENT COAST RAILWAY COMPANY *v.* LONDON, CHATHAM, AND DOVER RAILWAY COMPANY.

Railway Company—Ultrà Vires—Agreement for Lease—Statutory Confirmation of Agreement.

An Act of Parliament empowered one railway company to grant, and another company to accept, a lease of a railway upon such terms as should be agreed upon, provided that the power to lease should not arise till the Board of Trade had certified that it had been proved to their satisfaction that half the capital of the leasing company had been raised, and applied for the purposes of their Acts; and it was also provided that no lease should be of any effect unless previously sanctioned by three-fifths of the shareholders of each company voting at a special meeting:—

Held, that no lease, or binding agreement for a lease, could be made before the certificate had been obtained.

Heads of agreement for a lease were sanctioned by majorities of three-fifths at meetings of the two companies without any certificate of the Board of Trade being obtained, and were acted upon for several years, but no formal lease, or agreement for a lease, was ever executed. The heads of agreement were also invalid as providing for payment of the rent out of profits not so applicable:—

Held, that the arrangement was not ratified by references to it in subsequent local and personal Acts of Parliament not expressing any direct intention to confirm it.

Decree of *Stuart*, V.C., affirmed.

THIS Petition of appeal was presented for the purpose of reversing or varying a decretal order made on motion for decree in this suit, and also intituled in two other suits which arose from the embarrassments of the Defendants, the *London, Chatham, and Dover Railway Company*, in which *Gardner* and *Drawbridge* respectively were Plaintiffs, and that company Defendants.

The Appellants, the *Kent Coast Railway Company*, by their bill, asked for a declaration that certain heads of arrangement stated in the bill, and alleged to have been agreed upon between the Plaintiffs, the *Kent Coast Railway Company* (hereinafter called the *Kent Company*), and the Defendants, the *London, Chatham, and Dover Railway Company* (hereinafter called the *Dover Company*), were valid, and that the several receivers appointed in the other causes, or some of them (more particularly referred to in the pleadings), might be ordered to keep a separate account of the receipts of all traffic passing between stations on the *Kent Line* and stations on the *Dover Line*, and between stations on the *Kent Line*, and to account with the Plaintiffs for all such receipts upon the footing of the said heads of arrangement.

The *Dover Railway* comprised systems of lines of railway which, for the purposes of the present question, may be described as consisting, first, of certain lines from *London* to *Penge*, and, secondly, of a line from *Penge* to *Faversham*. The *Kent Line* commenced at *Faversham*, and passed on to *Whitstable*, *Herne Bay*, *Margate*, and *Ramsgate*. The traffic to some of the last-named places, especially to *Margate* and *Ramsgate*, might, and probably in many instances would, have followed the line of the *South Eastern Railway* in preference to any other route if the *Kent Railway* had not been constructed, so that the construction of that line was expected to bring considerable traffic to the line of the *Dover Railway* between *London* and *Faversham*, and the *Dover Company* therefore actively engaged in promoting the several undertakings of the *Kent Company*.

The *Herne Bay and Faversham Railway Act*, 1857, was the first Act authorizing the formation of any part of the *Kent Railway*. This was followed by the *Margate Act*, 1859, authorizing the company, under the name of the *Margate Railway Company*, to extend their line to *Margate*, and by the *Kent Coast Railway Act*, 1861, authorizing an extension to *Ramsgate*, and conferring on the company the name of the *Kent Coast Railway Company*. By all those Acts the *Dover Company* was authorized to enter into traffic arrangements with the *Kent Railway Company* under its various corporate designations, but the duration of such contracts was to be limited to ten years.

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In the *London, Chatham, and Dover Railway (Various Powers) Act*, 1861, the following enactments were contained, under which the heads of arrangement in question in this cause were alleged to have been duly entered into, and to have constituted a binding contract between the two companies:—

"6. The *Margate Railway Company* from time to time may lease the undertakings authorized by the *Herne Bay and Faversham Railway Act*, 1857, and the *Margate Railway Act*, 1859, respectively, and also any undertaking which the *Margate Railway Company* are or may be authorized to execute by any Act of the present session, unto the company (the *Dover Company*) for such terms, and in consideration of such rents or reservations, with such powers and privileges, and under and subject to such covenants, conditions, provisions, regulations, and restrictions, as the parties to any such lease think proper, and the company may accept such lease accordingly: Provided always, that such payments or rents shall not be paid out of any profits of the company other than the general profits of the company, nor out of any capital or loans raised for the purposes of any separate undertaking of the company: Provided also, that as regards the undertaking authorized by the *Kent Coast Railway Act*, 1861, the power to lease the same shall not arise until the Board of Trade shall certify that the *Margate Railway Company* have proved to the satisfaction of the Board of Trade that they have paid up one-half of the capital authorized by the Acts relating to that company (including the said Act of the present session) to be raised by means of shares, and have expended for the purposes of those Acts a sum equal thereto."

7. (Related to the recovery of rents.)

"8. No such lease shall be of any effect unless, previously to the making thereof, the terms thereof shall have been sanctioned by three-fifths at least of the votes of the shareholders of each company being a party thereto, voting personally or by proxy, at an extraordinary meeting of such company specially convened with notice of this object of the meeting.

"9. The *Margate Railway Company* and the company may enter into, and execute, any contracts or agreements for effecting all or any of the purposes of this Act with reference to such lease, or any objects incidental thereto, and every such contract or agreement

may contain such covenants, clauses, powers, provisions, and conditions as are mutually agreed upon between the parties thereto.

"10. Any such lease may be made notwithstanding that the company may, under the powers of any other Act, have previously entered into any contract or agreement with the *Margate Railway Company* for the working or user of the railways comprised in such lease, or any of them, or any part thereof, and any such lease may (if so agreed) provide for the determination of any such contract or agreement."

The interpretation clause of the same Act (s. 4) defined "general profits" of the company to mean "all profits applicable to dividend of the general undertaking, and so much, and so much only, of all other profits of the company applicable to dividend, as is not from time to time applicable to payment of interest or dividend on capital authorized for any separate undertaking of the company;" and it was provided that the expression "general undertaking" should mean the undertaking authorized by the *East Kent Railway Act*, 1853, and the *East Kent Railway* (*Extension to Dover*) *Act*, 1855, and, if and when the *Western Extension* became merged in the undertaking, should also include the *Western Extension*. This did not include the line from *London* to *Penge*.

The bill alleged that a binding contract had been entered into between the Plaintiffs and the *Dover Company* pursuant to the provisions of the last-mentioned Act for the perpetual working of the Plaintiffs' railway by the *Dover Company* according to certain heads of arrangement stated in the bill.

These heads of arrangement were dated the 2nd of April, 1862, and were intituled: "Heads of arrangement between the *London, Chatham, and Dover Railway Company*, and the *Kent Coast Railway Company*, for the perpetual working or lease of the lines of the *Kent Coast Company*." The arrangement provided that the *Dover Company* should work the line of the *Kent Coast Railway* between *Faversham* and *Ramsgate* when completed to the satisfaction of the engineer of the *Dover Company*, and maintain the line, and pay all the expenses of working. "The receipts for all traffic passing between stations on the *Kent Coast Line* and stations on the *London, Chatham, and Dover Line*, and stations on the *Kent Coast Line*, to be set apart; £50 per cent. of the same to be paid

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to the *London, Chatham, and Dover Railway Company*, for their expenses of working and maintaining the line; the remainder, up to £45,420 a year, to be paid to the *Kent Coast Railway Company;* anything above that amount to be divided in the proportion of three-fourths to the *London, Chatham, and Dover Railway Company*, and one-fourth to the *Kent Coast Company*." It was part of the arrangement that these terms should take effect from the opening of the line complete to *Ramsgate;* and it was provided that a formal contract embodying these terms should forthwith be sealed by the companies. The document contained nothing to define the period of the continuance of the arrangement except the words in the heading.

These heads of arrangement were read to a meeting of each company convened for that purpose, and were sanctioned by the votes of three-fifths of the shareholders of each company respectively, voting personally or by proxy. The meeting of the *Dover Company* was held on the 2nd of April, 1862, and that of the *Kent Company* on the 7th of the same month. The minute books of the *Dover Company* stated only a vote sanctioning the heads of arrangement then read, but did not set out or state the substance of the agreement. The minute books of the *Kent Company* mentioned the sanction so given, and set out the document. No further record whatever was to be found in the documents of either company of any formal contract or agreement being entered into by either company, nor even of the resolutions of the separate meetings of shareholders being communicated by one company to the other. No such certificate of the Board of Trade as mentioned in sect. 6 of the Act had been obtained, nor was it ever afterwards obtained.

The *Dover Company* commenced working the *Kent Coast* line on the 1st of May, 1864, according to the terms of the heads of arrangement. Receivers of the tolls of the *Dover Company* were afterwards appointed in the other suits above mentioned, or some of them, but the working of the *Kent Coast* line by the *Dover Company* continued until the decree of the Vice-Chancellor now appealed from.

The *Kent Coast Railway Act*, 1864, after reciting, among other things, the *Dover Company's Various Powers Act*, 1861, the 6th clause being recited in full, and the 7th, 8th, 9th and 10th referred

to, and reciting the working of the *Kent Coast* line by the *Dover Company* under contracts authorized by the recited Acts, recited that "in the year 1862 the terms of a lease to be made under the authority of the last recited Act were sanctioned by meetings of both companies, as required by that Act, and whereas those terms were calculated upon the amount of the capital and mortgage and bond debt of the company as then existing," and that it was expedient that the powers of the two companies for making and accepting leases, and contracts, and agreements for leases, should be extended and amended, and that for carrying out any future arrangement they should be empowered by mutual agreement to "rescind or modify the terms aforesaid." The 18th section of this Act empowered the *Kent Company* and the *Dover Company* to enter into contracts and agreements with respect to the leasing of the undertaking of the *Kent Company* to the *Dover Company*, and provided that "any such contract or agreement may be in addition to, or in substitution for, and may vary or rescind, the now existing terms of arrangement, or any future contract or agreement." Sect. 19: "The last proviso contained in the 6th section of the *London, Chatham, and Dover (Various Powers) Act*, 1861, is by this Act repealed." Sect. 20 extended the power given by sect. 6 of the former Act, and enacted that the powers of sect. 6, as amended by the now stating Act, "may be exercised in accordance with the now existing terms of arrangement, as varied by any contract or agreement made under the authority of this Act, or in accordance with any contract or agreement made under the authority of this Act in substitution for the now existing terms of arrangement."

In the preamble to the *London, Chatham, and Dover Railway (Kent Lines) Act*, 1865 (28 & 29 Vict. c. cccxlvii.), was contained a recital, that "under the authority of the *London, Chatham, and Dover Railway (Various Powers) Act*, 1861, and the *Kent Coast Railway Act*, 1864, the undertaking of the *Kent Coast Railway Company* is leased to the company," *i.e.* to the *London, Chatham, and Dover Railway Company.*

The *London, Chatham, and Dover Railway (New Streets) Act*, 1865, contained in its preamble a recital that "it is expedient that the *Kent Coast Railway Company* (whose undertaking is under the

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authority of Parliament leased to the company) be authorized" to make a certain street.

Vice-Chancellor *Stuart* held that the *Kent Company* had not established any title to relief, and His Honour made a decree proceeding on the footing that the heads of agreement were of no effect.

Mr. *Mellish*, Q.C., Mr. *Druce*, Q.C., and Mr. *Ferrers*, for the *Kent Company*, in support of the appeal:—

Sect. 6 of the Act of 1861 authorizes an arrangement on any terms, and is not confined to a lease, as appears more clearly by its mentioning "rent or other payment." The agreement, therefore, was *intrà vires*. The proviso in sect. 6 only means that if the rent was reserved out of profits it should be out of general profits. By the heads of agreement it was not made payable out of profits at all, the agreement being in fact an agreement for sharing gross earnings. The failure to obtain the certificate of the Board of Trade was cured by the Act of 1864, which repealed the proviso requiring it. The agreement may be supported under the *Railways Clauses Act*, 1845, s. 87. The subsequent Acts deal with the agreement in such a way as to amount to a statutory confirmation of it: *Galloway* v. *Mayor and Commonalty of London* (1).

Sir *Roundell Palmer*, Q.C., and Mr. *Kekewich*, for the *Dover Company*:—

When the meetings of April, 1862, were held, the power to lease had not arisen, for the certificate of the Board of Trade had not been obtained. Unless, therefore, there has been an effectual confirmation, the case is at an end. The *Kent Coast Railway Act*, 1864, is no confirmation, for the object of that Act was merely to extend the powers of the company, and it does not contain a word shewing an intention to affect one way or the other the validity of past transactions. The loose recitals in the two later Acts cannot alter the rights of the parties: *Howard* v. *Earl of Shrewsbury* (2); *Mackenzie* v. *Stuart* (3); *Biddulph* v. *Biddulph* (4). In *Galloway* v. *Mayor and Commonalty of London*, there were special words

(1) Law Rep. 1 H. L. 34. (3) 5 Cru. Dig. 23, pl. 51, 4th Ed.
(2) Ibid. 2 Ch. 760. (4) Ibid. 26, pl. 53.

pointing at confirmation. The agreement, moreover, was void, as it made the rent payable out of gross earnings, sect. 6 only allowing it to be made payable out of "general profits," as defined by the Act. The *Railways Clauses Act*, 1845, s. 87, does not authorize such an agreement as this: *Beman* v. *Rufford* (1).

Mr. *Bacon*, Q.C., Mr. *Martineau*, and Mr. *Bridge*, for *Gardner* and *Drawbridge*, debenture holders of the *Dover Company*, and Plaintiffs in suits against it:—

The meetings were not advertised in the county of *Kent*, as required by the *Herne Bay and Faversham Act*, 20 & 21 Vict. c. clii. s. 16.

[The LORD JUSTICE WOOD:—I am not clear that we can give effect to such an objection, coming from a debenture holder, after the agreement has been worked for several years.]

The agreement is void for want of the certificate of the Board of Trade, which was matter of substance. This condition was withdrawn in 1864, because the works had been done, and there was no longer any use in requiring it, but the repeal was not intended to have, and cannot have, any retrospective effect. This agreement was entered into by the *Dover Company*, our mortgagors, behind our backs, and it inflicts a heavy loss upon us. The *Railways Clauses Act*, s. 87, does not authorize a lease: *Simpson* v. *Denison* (2); nor such an agreement as this: *London, Brighton, and South Coast Railway Company* v. *London and South Western Railway Company* (3). The recitals in the later Acts do not confirm it.

Mr. *Greene*, Q.C., and Mr. *Rodwell*, for another debenture holder:—

The power to grant the lease had not arisen.

[The LORD JUSTICE WOOD:—Might not the agreement be binding as an agreement to grant a lease as soon as the power should arise?]

No; because the body of shareholders, whose assent was required might be quite different at the two periods; and what was required

(1) 1 Sim. (N.S.) 550. (2) 10 Hare, 51.
(3) 4 De G. & J. 362.

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was the assent of the persons who should be shareholders after half the capital had been paid up and expended—a real *bonâ fide* body of shareholders. Moreover, there really was no agreement at all,—nothing but an authority by the shareholders to the directors to enter into an agreement on certain terms, and there the matter was left. The recitals in the later Acts do not confirm the arrangement: *Dwarris* on Statutes (1).

Mr. *F. Harrison*, Mr. *Langworthy*, and Mr. *Cookson*, for other parties.

Mr. *Druce*, in reply:—

As regards the absence of a concluded agreement, there was part performance; and our money has been expended on the faith of the agreement, which has been acted upon for several years.

June 9. SIR W. PAGE WOOD, L.J., delivered the judgment of the Court, and after stating some of the facts, and disposing in favour of the Plaintiffs of a question whether certain words in the heads of agreement had not been interlined after it had been read to one of the meetings, continued:—

The next question appears to us a very serious one. Does this reading and this sanction of the heads of arrangement constitute a valid agreement under the *Various Powers Act* of Parliament of the *Dover Company* of 1861?

In the first place, by the 6th clause of that Act, the power to lease is not to arise until the Board of Trade shall certify that the *Kent* (then the *Margate Company*) have paid up one-half the capital authorized to be raised by shares by the Acts relating to that company, including the Act of that session, and have expended for the purposes of those Acts a sum equal thereto. Then the 8th section directs that no such lease shall take effect until the terms thereof shall have been sanctioned by three-fifths of the shareholders in each company.

We think it was not competent for the companies to enter into

(1) Page 503.

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any lease, or binding agreement for a lease, until the certificate of the Board of Trade had been obtained. The sanction, therefore, of the two meetings would not amount to such an agreement in the absence of that certificate. Again, the meetings could not act as the executive body. The directors are the persons authorized to contract on behalf of the company; the meetings might sanction such contract previously to, or after, its execution, but were not the contracting parties.

The proper course would have been for the directors first to obtain the certificate, they then might have submitted heads of arrangement to a meeting, and then have executed a lease; but nothing of the kind has been done. The two companies have approved of something which, at the time of such approval, could not be, and was not, a lease or binding agreement for a lease, for the power of leasing had not arisen, owing to the absence of the certificate of the Board of Trade. This certificate, again, appears to us to be of the substance of the case as regards the consent of three-fifths of the shareholders; for the construction of the two sections, the 6th and the 8th, appears to be this, that the Legislature wished to secure by clause 6 a responsible constituency of each company before they should have any contracting power, viz., shareholders who had paid up and expended one-half the authorized capital. Otherwise none of the capital of the new line might be subscribed for beyond some twenty or thirty shares, and the votes of the holders of a trifling amount of shares might sanction a lease in perpetuity of the yet uncommenced railway before the *bonâ fide* shareholders had been called into existence.

It is clear that before 1864, at all events, no valid lease existed; and we shall consider presently the effect of the Act of that year, and subsequent Acts of Parliament, in conferring upon it any validity.

It is right, however, before passing to those subsequent Acts, to consider whether the heads of arrangement, supposing them to have been so sanctioned as to amount to an agreement, would, even if the certificate of the Board of Trade had been obtained, amount to a due execution of the power conferred by the 6th and following sections of the *Various Powers Act* of 1861.

The first objection taken by the Defendants, the *Dover Company*,

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was that an agreement for perpetual working is not a lease "for a term" within the purview of the Act. We are not inclined to think that this objection would be fatal, or that it would be beyond the power of the Court in directing the execution of such an agreement, to substitute a term of 1000 years for the expression "perpetual." A power to create a term of years as to land would not, of course, authorize an agreement for disposing of the fee simple, owing to the totally different incidents to the two tenures. But where, as here, the duration of a working contract alone is in question, the difficulty suggested might probably be surmounted.

But a much more grave objection exists to the substance of the contract. The 6th clause of the *Various Powers Act*, 1861, expressly provides that the rent shall not be paid out of any profits of the company, other than "the general profits of the company." The interpretation clause of the same Act defines "general profits of the company" to mean "all profits applicable to dividend of the *General Undertaking*, and so much, and so much only, of all other profits of the company applicable to dividend as is not from time to time applicable to payment of interest or dividend on capital authorized for any separate undertaking of the company;" and it is provided that the expression "general undertaking" shall mean the undertaking authorized by the *East Kent Railway Act*, 1853, and the *East Kent Railway* (*Extension to Dover*) *Act*, 1855; and, if and when the *Western Extension* is merged in the undertaking, shall also include the *Western Extension*. With reference to the expression, "profits applicable to the payment of interest or dividend," it may be well to remark, that the *Companies Clauses Act* (8 Vict. c. 16, s. 120) directs that previously to declaring a dividend a scheme shall be prepared by the directors shewing the profits of the company (if any) for the period current since the last declaration of dividend, and apportioning the same, or so much thereof as they may consider applicable to the purposes of dividend, among the shareholders. By the 122nd section of the same Act the directors are authorized (if they think fit) before such apportionment to set apart such sum as they may think proper for meeting contingencies, or for enlarging, repairing, or improving the works.

We think, therefore, that upon the true construction of the

Dover Company's (Various Powers) Act, 1861, taken in conjunction with the *Companies Clauses Act*, "profits applicable to payment of dividend or capital authorized to be raised for any separate undertaking," would be profits ascertained by deducting from the gross earnings of such separate undertaking the expenditure properly chargeable to the debit of the same undertaking, subject, moreover to setting apart such sums only as are referred to by the 122nd section of the *Companies Clauses Act*.

Now the contract in question, if valid, would authorize a specific charge capable of being enforced by the appointment of a receiver on all the tolls receivable for traffic passing from any point of the *Dover* system of lines to any point on the *Kent Line*, say from *London* to *Whitstable*. But it is conceded that the lines from *London* to *Penge* are not part of the "general undertaking of the *Dover Railway*." But must not the tolls earned on those portions of railway be taken into account in forming a scheme of dividend under the *Companies Clauses Act*, and must not the profits applicable to such dividend be taken out of those tolls? It appears to us that this must be so, and that the distinction cannot be sustained which was urged by Mr. *Druce* between "earnings" and "profits applicable to dividend;" the gross receipts or earnings are an essential element of the calculation of profits, no profits can be made except through the medium of the earnings.

Mr. *Druce* says in effect—we admit that we cannot take away the water when drawn, but we may remove the well; or,—we cannot claim the fruit, but we may appropriate the tree. Still more may it be said, that those earnings are the source of profit out of which the interest on capital would be payable; to place a receiver on the tolls of portions of the railway not within the *General Undertaking* would at once annihilate all profit on those lines, or, rather, transfer that profit to the payments reserved by the agreement. Profits, in fact, being earnings *minus* all charges, must necessarily be included in the earnings.

We do not think that the clause in the *General Railway Act* sanctioning arrangements between railway companies with reference to their traffic, in any way assists the view of the Appellants.

Having come to this conclusion, we conceive that, properly speaking, there can be no confirmation of an agreement which had

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no validity, either in form or substance, at the date of the subsequent Acts of Parliament on which the Plaintiffs have relied as concluding the Defendants. It would require a very clear and explicit enactment reciting or distinctly referring to the imperfect contract, creating, in fact, a new parliamentary engagement between the parties to the attempted agreement. Has this been done?

The Acts of Parliament relied upon for this purpose were the *Kent Coast Railway Act*, 1864; the *London, Chatham, and Dover Railway* (*Kent Lines*) *Act*, 1865; and the *London, Chatham, and Dover Railway* (*New Streets*) *Act*, 1866.

The *Kent Coast Railway Act*, 1864, contains in its preamble the following recitals as to the matters now in question:—

It first mentions the working of the *Kent Line*, and the conducting of the traffic thereon by the *Dover Company*, as being under contracts (in the plural) authorized by the recited Acts, and then proceeds to refer to the alleged contract in question in this suit, evidently alluding, therefore, in the first instance to the working agreements previous to that in dispute. The preamble then recites in full the 6th clause, and refers to the subsequent clauses of the *Dover Railway Company* (*Various Powers*) *Act*, 1861, down to the 10th inclusive, and then says the terms of a lease to be made under the authority of that Act were sanctioned by meetings of both companies "as required by that Act." The preamble then recites that those terms were calculated on a defective basis, and that it is expedient that the powers of the two companies for making and accepting leases and contracts, and agreements for leases, should be extended and amended, and that for carrying out any future arrangement they should be empowered by mutual agreement to "rescind" or modify "the terms aforesaid."

It was much pressed upon us that this preamble must have been proved, that Parliament must, therefore, have had before it the heads of arrangement, the various proceedings of the two companies, and had, in effect, declared that the meetings were properly held, and that the agreement was a valid and subsisting agreement, especially as it required legislative authority to enable the companies to "rescind it." But it may be observed that the recital states only that the terms of a lease *to be made* under the authority

of the Act had been sanctioned by such meetings, and does not recite the making of the lease, or, indeed, profess in any direct way to attribute validity to the terms so sanctioned as constituting a binding agreement. On the contrary, Parliament seems to have been aware that the certificate of the Board of Trade had not been obtained, for it recites that necessary preliminary, and does not recite any compliance with it, but the Act itself subsequently repeals the provision of the former Act.

The preamble recites also the provision prohibiting payment under any leases out of profits other than general profits, and does not pronounce any opinion upon the validity of the terms of the lease in that respect.

The case of *Galloway* v. *Mayor and Commonalty of London* (1) was strongly pressed upon us as an authority for holding that a Parliamentary recognition of a contract would correct any defect arising from the contract being in excess of the power under which it purported to be made; but the question there was whether a contract was in fraud of a previous Act of Parliament, and the subsequent Act referred very clearly to the disputed contract, and declared that the company with whom it had been entered into should have the benefit of it. The learned Lords who spoke upon the appeal did not all agree in holding that even such a declaration was sufficient to give the contract validity. But we are clearly of opinion that the mere statement of terms of a lease intended to be made having been sanctioned by the shareholders without any recital of those terms, or of a lease having been executed, cannot give a legislative effect to the heads of arrangement.

The 18th section empowers the companies to enter into new agreements, and to vary or rescind the then existing terms of arrangement, and the 19th section of the same Act abolishes the necessity of the certificate from the Board of Trade. We do not consider it necessary to inquire whether this section could have a retrospective effect, so as to dispense with that provision as a condition precedent to an existing lease or otherwise binding agreement, since we do not think that, independently of that question, any such agreement had been come to, especially as we are further of opinion that the heads of arrangement are them-

(1) Law Rep. 1 H. L. 34.

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selves incapable of being dealt with, owing to their non-compliance with the fourth provision of the Act of 1861, as to not trenching on any profits other than general profits, a restriction expressly continued by the Act now under consideration.

The *London, Chatham, and Dover Railway Company* (*Kent Lines*) *Act*, 1865, recites in its preamble, that under the authority of the *London, Chatham, and Dover Railway* (*Various Powers*) *Act*, 1861, and the *Kent Coast Railway Act*, 1864, the undertaking of the *Kent Company* is leased to the *Dover Company*. Our observations as to the effect of such a recital would apply with far more force to so meagre and incorrect a statement than to the recitals in the Act of 1864. The statement is incorrect, for nothing had been done under the Act of 1864, and it is clear that the correct facts were not before the Legislature.

The *London, Chatham, and Dover Railway* (*New Streets*) *Act*, 1866, in one passage of its preamble recites that it is expedient that the *Kent Coast Railway Company* (whose undertaking is under the authority of Parliament leased to the company), meaning the *Dover Company*, be authorized to make a road therein specified. This parenthetical form of recital is a far weaker recognition than the passages in the previous Acts as to the alleged agreement.

This Act of 1866 exhibits the correct mode of establishing an agreement by authority of Parliament in its 25th section, which refers to an agreement between the *Dover Company* and the *Apothecaries Company* as being set out in the schedule to the Act, and confirms it; and we think that if the Legislature had intended to give validity to an arrangement which was, in our judgment, altogether invalid, at least up to 1864, it would have done so in plain and distinct terms.

In truth, the assumption we are asked to make—that the agreement said to exist must have been proved before Parliament—is a matter not of assumption, but capable (if such were the fact) of direct proof. We know of no other evidence of the existence of an agreement than that produced in this cause, and we do not think that, in the absence of a direct confirmation of so imperfect an arrangement, the various recitals referred to can in themselves operate so as to confer validity upon the heads of arrangement as a contract equivalent to a lease. So to hold would be in effect to

repeal by recital the condition expressly retained by the Act of 1864, prohibiting any payment out of profits not being general profits.

It has been said that there has been a part performance, and that moneys have been subscribed on the faith of the agreement. But it must be observed that the *Dover Company* were in possession of all the lines except the *Ramsgate* continuation at the date of the heads of arrangement, and that by the condition imposed of the Board of Trade certificate as to payment and expenditure of one-half of the moneys authorized to be raised, the subscriptions to that extent must have been obtained before it could be known that any agreement whatever would be taken into consideration.

No part performance, however, could authorize that which the bill avers to be the scope of the agreement, namely, the appropriation of the traffic receipts on portions of the line not included in the *General Undertaking* to payment of the Plaintiffs' demand, and if every other difficulty could be overcome this would remain as a fatal objection to the declaration asked for by the bill—a declaration equivalent to specific performance of that which appears to us to have been, even if concluded, a wholly invalid arrangement.

The appeal, therefore, must be dismissed with costs.

Solicitors: Messrs. *Baxter, Rose, Norton, & Co.;* Messrs. *Maynard, Son, & Co.;* Messrs. *Harrison, Beal, & Harrison;* Messrs. *Walker & Martineau;* Messrs. *Dale & Stretton;* Messrs. *Hollingsworth, Tyerman, & Green.*

L. C.
1868
June 5

BROOK *v.* BADLEY.

Mortmain—Charity—Bequest of Charge—Apportionment—Charge on Realty and Personalty.

A legacy payable out of personalty and of the proceeds of the sale of real estate, is an interest in land within the *Statute of Mortmain*, and cannot, whilst it remains unpaid, be bequeathed by the legatee for charitable purposes.

Nor can there be any apportionment, so as to make that part of the legacy which would be paid out of personalty available for the charitable bequest.

Order of the Master of the Rolls affirmed.

Marsh v. *Attorney-General* (1) and *Shadbolt* v. *Thornton* (2) observed upon.

DR. *WITHERING*, by his will, gave his real estate and his personal estate to trustees, with directions to sell the real estate and other available property, and, after payment of his debts and certain legacies, he directed the trustees out of the money so arising, after the death of his wife, to set apart £6000, and to pay £3000, part thereof, to certain persons, and the remaining £3000 to *Henry Hunt*, from whom Miss *Pargeter* bought it. Miss *Pargeter*, by her will, gave all her personal property applicable for the purposes of mortmain to trustees upon trust for charitable purposes (3). The widow of Dr. *Withering* was still alive, and the £6000 had never been raised.

The Master of the Rolls held that this sum of £3000, forming part of Miss *Pargeter's* estate, was an interest in land within the *Statute of Mortmain*, and could not be bequeathed to charitable purposes; as reported (4), where the facts are more fully stated.

The trustees of the charities appealed.

Mr. *Baggallay*, Q.C., and Mr. *Osler*, for the charities:—

Miss *Pargeter* took this legacy as money, and could give it to charitable purposes: *Myers* v. *Perigal* (5); *Ashton* v. *Langdale* (6). If the first testator had directed land to be sold and the proceeds

(1) 2 J. & H. 61.
(2) 17 Sim. 49; 13 Jur. 597.
(3) *Jones* v. *Badley*, Law Rep. 3 Eq. 635; on app. 3 Ch. 362.
(4) Law Rep. 4 Eq. 106.
(5) 2 D. M. & G. 599.
(6) 15 Jur. 868.

to be given to the second testator, the case would be different, but here the second testator takes merely a share of a sum of money, and could not elect to take it as land, so as to make the bequest obnoxious to the *Mortmain Statute*: *Attorney-General* v. *Harley* (1) has been overruled, and *Shadbolt* v. *Thornton* (2), and *Marsh* v. *Attorney-General* (3), are in our favour. As long as the land cannot come to the charity as land, there is no objection to the gift. A banking company may be mortgagees, but it has been decided that the shares in such a company may be given to a charity. Even if the Court should hold that the gift is void as a devise of land, at all events there must be an apportionment, and so much of the legacy as would come out of the personal estate of Dr. *Withering* will pass. We say that Miss *Pargeter's* executors have no occasion to ask where the £3000 comes from; but if they do, then clearly so much as comes from personalty will go to the charities.

Mr. *Jessel*, Q.C., and Mr. *F. C. J. Millar*, on the other side, were not called upon.

Mr. *Southgate*, Q.C., and Mr. *Peck*, for the executors of Miss *Pargeter*.

LORD CAIRNS, L.C.:—

I should desire very much in a case of this kind to follow the rule laid down by Lord *St. Leonards* in *Myers* v. *Perigal* (4), namely, that in construing the provisions of the *Mortmain Act* the Court should neither lean, as it was said to have done in former times, against the charity, nor, on the other hand, lean, as it is said to have done at some subsequent time, in favour of the charity, but endeavour to find out exactly what is the meaning of the Act, and to give effect to that meaning upon the ordinary principles of construction.

Now upon the first part of this case, I think that no reasonable doubt can be entertained; it is admitted that if a testator devises his real estate to be sold, and the proceeds paid to *A. B.*,

(1) 5 Madd. 321.
(2) 17 Sim. 49; 13 Jur. 597.
(3) 2 J. & H. 61.
(4) 2 D. M. & G. 619.

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and *A. B.* subsequently makes his will, and either devises those proceeds by name, or devises all his property to charity, the proceeds of the sale of that real estate will not go to the charity, and the bequest of the second testator to that extent is invalid. That is not matter in controversy at the present day. It has, indeed, been suggested as the reason for this, that the second testator, or those who claim under him, might, instead of having the land sold, insist upon taking it in its unconverted form, and thus the charity might become the actual possessor of specific real estate. But this cannot be the true reason, for if a testator devises his land to be sold, and the proceeds given, not to one person, but to four persons in shares, and if one of those four persons afterwards makes his will, and gives either his share of the proceeds or all his property to charity, the position of that second testator with regard to the estate which is to be sold is in substance that of a person who has a direct and distinct interest in land. The estate is in the hands of trustees, not for the benefit of those trustees, but for the benefit of the four persons between whom the proceeds of the estate are to be divided when the sale takes place. It may very well be that no one of those four persons could insist upon entering on the land, or taking the land, or enjoying the land *quà* land, and it may very well be that the only method for each one of them to make his enjoyment of the land productive, is by coming to the Court and applying to have the sale carried into execution, but nevertheless the interest of each one of them is, in my opinion, an interest in land; and it would be right to say in Equity that the land does not belong to the trustees, but to the four persons between whom the proceeds are to be divided. If the cases of *Marsh* v. *Attorney-General* (1), and *Shadbolt* v. *Thornton* (2), are at variance with these principles then I am unable to follow those authorities.

It appears to me that if the principle which I have endeavoured to express is correct, it entirely governs the case before me as to the first of the two points which have been argued, because this was the position of things, laying aside the question as to the personalty of the first testator, and supposing that he had nothing but real estate:—He directed that after the death of his wife, or during

(1) 2 J. & H. 61. 7 Jur. N.S. 184 (2) 17 Sim. 49.

her life with her consent, his real estate should be sold and turned into money, and that out of the proceeds of the sale of that real estate £6000 should be set aside, and £3000 held for Mr. *Henry Hunt*, under whom Miss *Pargeter*, the second testatrix in the case, claims. The case, as I have described it, seems to me to be exactly within the 3rd section of the *Mortmain Act* (9 Geo. 2, c. 36), which enacts that all gifts, grants, conveyances, appointments, assurances, transfers, and settlements whatsoever of any lands, tenements, or other hereditaments, or of any estate or interest therein, to any charitable use shall be void.

The second question which has been raised is this:—Assuming that the gift by the second testatrix, Miss *Pargeter*, would, *quoad* this £3000, be obnoxious generally to the 3rd section of the *Mortmain Act*, then it is said that the whole of the bequest ought not to fail, but that there ought to be an apportionment, and that inasmuch as Dr. *Withering*, the first testator, did not merely direct the conversion of his real estate, and the payment of the £6000 out of it, but directed that his personal estate and the proceeds of his real estate should be treated together as an available fund, and £6000 paid generally out of the whole, there ought therefore to be an apportionment, and, so far as the legacy in question is paid out of the personalty, it should be made available for the charity, and so far as it is paid out of the realty it should fail.

Now there is no doubt as to the rule of the Court in the administration of the estate of a testator possessing both personal and real estate who gives legacies to charities. The legacies, after taking an estimate of the values of the personalty and realty, so far as they would be made to fall on the personalty are supported, and so far as they would fall on the realty are invalid. But this is a case altogether of a different kind, for there is no apportionment between the different parts of the estate of the testatrix at all. The testatrix at the time of her death has an item of property, which is a sum of £3000, secured not upon her own property, but upon the property of another testator, who has charged both his real and personal estate with the payment of that £3000. It seems to me to be just the same thing as if the second testatrix had at the time of her death a sum of £3000 secured to her by a mortgage both of real and personal estate. It has never been suggested that in such a

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case the Court would have jurisdiction to make any apportionment. The charge is a charge upon every part of the security, and may come out of the personalty, or may come out of the realty, or may come out of both. The Court has no means of knowing from which it will come; but finding that the whole sum of £3000 is wholly and entirely secured upon the realty, the Court cannot make an apportionment negativing the security upon the realty, saying that the £3000 is to that extent secured upon the personalty, and the personalty only. Therefore, I think, there is no ground for an apportionment, and that the conclusion of the Master of the Rolls was right. This appeal, therefore, must be dismissed.

Solicitors: Mr. *S. W. Johnson;* Messrs. *Ashurst, Morris, & Co.;* Messrs. *Clarke, Woodcock, & Ryland,* agents for Mr. *Chesshire, Birmingham;* Messrs. *Robinson & Preston.*

L. C. 1868 June 3, 5.

DOLAN *v.* MACDERMOT.

Will—Charitable Legacy—Charities and other Public Purposes in T.

Bequest of personalty "for such charities and other public purposes as lawfully might be in the parish of *T.*":—

Held, a good charitable gift.

Order of the Master of the Rolls affirmed.

9 Ch. 328
3 Ch. D. 349,
W.R. 31/173
21 Ch. D. 115

A TESTATOR gave his estate to trustees upon trust to lay out the same "in such charities and other public purposes as lawfully might be in the parish of *Tadmarton,*" as the trustees should think fit.

The Master of the Rolls held that this was a good charitable bequest, as reported (1); and the next of kin appealed.

Mr. *Jessel,* Q.C., and Mr. *Fischer,* for the Appellants:—

The gift is bad, because it is for public purposes which are not charitable, and because it is too wide, being for charities in the parish, and not for the benefit of the parish, and the trust is too

(1) Law Rep. 5 Eq. 60.

indefinite. To build barracks would be a public purpose, but not charitable: *Kendall* v. *Granger* (1); *Morice* v. *Bishop of Durham* (2); *Ellis* v. *Selby* (3). The words are words of locality and nothing else: *Attorney-General* v. *Heelis* (4).

Mr. *Wickens*, for the Crown:—

Attorney-General v. *Eastlake* (5) explains *Attorney-General* v. *Heelis*, and shews that such a gift for public purposes would be charitable. *Mitford* v. *Reynolds* (6), and *Nightingale* v. *Goulbourn* (7), are stronger cases. A gift for the benefit of the inhabitants of the parish would be clearly good. It would be a narrow construction to say that the "other public purposes" must not be charitable.

Mr. *Baggallay*, Q.C., and Mr. *Bagshawe*, for the trustees of the will.

Mr. *Jessel*, in reply:—

The word charity is either used technically or not; if it is not used in the technical sense the gift is bad, if it is, then the "other purposes" cannot be good. There is nothing to shew that this is a gift for the benefit of the inhabitants of the parish. A gift to public purposes is not charitable: *Williams* v. *Kershaw* (8); *Kendall* v. *Granger*.

LORD CAIRNS, L.C.:—

It is not necessary in this case to decide what the effect of a gift to trustees to be laid out "in such charities and other public purposes as they shall think fit," would be, because these are not the words which are used. It would be shutting our eyes deliberately to the plain and simple meaning of words if the Court were to construe the words in this will otherwise than as a gift to trustees of money to be laid out in such charities and other public purposes as they think fit *for the benefit of the parish of Tadmarton;* for I take it that a gift to trustees to be laid out in

(1) 5 Beav. 300.
(2) 10 Ves. 522.
(3) 1 My. & Cr. 286.
(4) 2 S. & S. 67, 77.
(5) 11 Hare, 205, 215.
(6) 1 Ph. 185.
(7) 2 Ibid. 594.
(8) 5 Cl. & F. 111, n.

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charities in the parish of *A.* is a gift to trustees to be laid out in charities for the benefit of the parish of *A.*

What, then, is the meaning of the words "charities and public purposes?" It is quite true that the term "charity," or the term "charitable purposes," technically, and in the eye of this Court, has a meaning so extensive as to include everything which is expressly described in the statute of *Elizabeth*, or is within what has been called the equity of the statute; but there is, perhaps, not one person in a thousand who knows what is the technical and the legal meaning of the term "charity." It is clear that this testator when he used the word "charities" did not point to private charities, because he accompanies the term with the words "and other public purposes," evidently implying that the word first used meant public charities. It therefore appears to me the reasonable and fair construction to be put upon this will—remembering always that in construing a will of this kind the Court must not lean to the side of avoiding the will in order to gain money for the family, nor, on the other hand, strain to support the will to gain money for the charity—is that the testator directs his residue to be laid out for the benefit of the parish of *Tadmarton* "in public charities," using that term in the popular sense, "and in other public purposes" *ejusdem generis*, using those latter words as supplying and filling up a description of the purposes which, although within the statute of *Elizabeth* and the technical doctrine of the Court with regard to charities, are not within the popular meaning of the word "charities." By using these latter words the testator has simply given a description of all that is charity in the technical sense in which that word is used by the Court; and he has, therefore, pointed out a charitable gift for the benefit of the parish of *Tadmarton*.

I think that the decision of the Master of the Rolls is right, and that the appeal must be dismissed. The costs were paid out of the estate in the Court below, and I am disposed to provide for the costs in the same way here.

Solicitors: Messrs. *Wilde, Humphry, & Co.*; Messrs. *Bischoff, Coxe, & Bompas*; Messrs. *Raven & Bradley*.

RICHMOND *v.* NORTH LONDON RAILWAY COMPANY.

L. C.
1868
July 11, 15.

Railway Company—Compulsory Powers—Notice to Treat—Time of Completion.

A railway company, after the compulsory powers of their original Act had expired, and the railway was opened for traffic, obtained another Act enabling them to widen their line and enlarge their stations, and to take additional pieces of land:—

Held, that, under the circumstances, the company could not proceed to take a piece of land subject to the compulsory powers of both Acts under a notice to treat given under their original Act.

Quære, whether the compulsory powers of taking land, if not acted upon, ought not to expire when the time limited for the completion of the railway has expired.

Decree of the Master of the Rolls affirmed.

THE Plaintiffs in this case were owners of a public-house which the *North London Railway Company* had power to take under their Act of 1861. The company, in January, 1863, gave notice that they required the property, and some negotiations then took place, but nothing was settled. The compulsory powers under the Act expired in 1865, and the railway was completed and opened in December, 1865. The period limited for completion of the railway expired on the 22nd of July, 1866, and the Plaintiffs afterwards granted a lease of the public-house at an increased rent. In 1867 the company obtained a new Act empowering them to widen portions of the railway, and to enlarge the stations; and this public-house was included amongst the lands which they were empowered to take for these purposes. The company, in September, 1867, wished to proceed with the purchase under the notice already given, and the Plaintiffs then filed this bill to restrain the company from proceeding unless they gave another notice under the Act of 1867. The Master of the Rolls restrained the company as reported (1), where the facts are more fully stated.

The company appealed.

Mr. *Southgate*, Q.C., and Mr. *Rodwell*, for the company:—

The time limited by the Act for completion of the railway, on

(1) Law Rep. 5 Eq. 352.

L. C. 1868 RICHMOND v. NORTH LONDON RAILWAY CO.

which the Master of the Rolls relied as limiting the time for purchasing, is only as between the company and the public, and has nothing to do with third parties. There is nothing to prevent the company from going on and making works at any time on any land they have acquired, or can acquire. The company is not obliged to proceed on all the notices to treat at once; if they did, the calls they are empowered to make would not suffice to produce the money required. The Plaintiffs have been quite as much to blame for any delay as we have, and could always have forced us to go on: *Marquis of Salisbury* v. *Great Northern Railway Company* (1); *Pinchin* v. *London and Blackwall Railway Company* (2); *Reg.* v. *Birmingham Railway Company* (3); *Thicknesse* v. *Lancaster Canal Company* (4). The Plaintiffs have never asked us whether we meant to take their land or leave it. *Hedges* v. *Metropolitan Railway Company* (5) is no authority on this point. We have a legal right to take this land, and the Plaintiffs cannot come here relying on the lapse of time, as to which they were as much in fault as we were.

Mr. *Baggallay*, Q.C., and Mr. *Freeling*, for the Plaintiffs, were not called upon.

LORD CAIRNS, L.C.:—

The railway company are, of course, entitled to have this case decided according to their strict rights. The claim set up by them is a claim *strictissimi juris*. It is admitted that under their Act of 1867 they have ample powers to give the requisite notices and become the owners of this property; and the only suggestion why they should not do so is, that pending the delay fresh interests have been created by the persons to whom the former notice was given, and that the railway company by giving fresh notices would now have to compensate two persons, which is always found to result in more money having to be paid. It might be a very beneficial rule to lay down, and I do not say that I differ from the Master of the Rolls as to what should be the rule—that

(1) 7 Railw. Cas. 175.
(2) 1 K. & J. 34, 65.
(3) 6 Railw. Cas. 628.
(4) 4 M. & W. 472.
(5) 28 Beav. 109.

where a railway company is limited in time for taking land by compulsion, and is also limited in time for completing their works, then, if they sleep upon their works, when the time for completion of them has come, they should be held disabled from going on with any compulsory purchase. But it is not necessary to lay down any such rule in this case, and I do not desire to be considered as laying down any such rule.

One of the best established objects of the jurisdiction of this Court is to take care that companies exercising powers under their Acts shall not exercise them otherwise than for the purposes of the Act, and when there is any ground for supposing that the powers are to be exercised for any other purpose, the Court should see whether the company is really misusing its powers.

Great latitude must be given to the company and great faith to their statements as to the land which will be required for any particular work, and the Court will not try the question with any great minuteness, and must place much reliance upon what the officers of the company may say. But there are in this case peculiarities. The Act says that the railway shall be completed within five years and then the powers shall cease. The word "railway" here must mean, of course, the railway and works which are described in the 6th section of the Act of 1861, 24 & 25 Vict. c. cxcvi., by which they are authorized to make and maintain a railway from and to the places therein mentioned, together with such stations, approaches, and other works as might be found convenient. No doubt they will have to maintain the line, and, from time to time, in the maintenance of the line to add collateral works immediately necessary for the construction of the railway, and the Court has to decide whether the land in question was wanted for this purpose up to the time limited for the completion of the railway.

It is obvious that very great latitude must be allowed to the company in making the line and the stations, but the evidence here is, that in the month of December, 1865, this railway was, in the popular sense of the word, completed and open for use, and it appears to me that after that took place, though I am not prepared to hold that the company could not then, under any circumstances, have gone on and acted on their notice, yet

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it is a very different question which the Court now has to try. The onus is changed, and the company must shew that they want the land for the purpose of their Act; and if there is any specific purpose pointed out I should be glad to hear it. But there is not a fragment of evidence which suggests for what purpose this land is wanted. There is evidence that every railway, with an increase of traffic, wants land for its development and for stations, but no particular purpose is pointed out for which this land is required, and, in fact, the company has obtained another Act (30 Vict. c. lxxviii.) enabling them to widen portions of their railway, to enlarge certain stations, and to purchase or acquire additional lands and houses. They have scheduled this very piece of land, and say they want it for the purposes described in the Act of 1867; and how then can they say that they want this land, not for the purposes mentioned in that Act, but for other purposes.

The appeal must be dismissed with costs.

Solicitors for the Plaintiffs: Messrs. *Hunter, Gwatkin, & Hunter.*
Solicitors for the Defendants: Messrs. *Paine & Layton.*

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1868
July 15, 20.

ROSS *v.* ESTATES INVESTMENT COMPANY.

Company—Misrepresentation in Prospectus—Relief from Shares.

The directors of a company published a prospectus stating, amongst other things:—1. That more than half the shares had been subscribed for. 2. That the company had contracted to purchase estate *A.*, on which the vendors had expended £70,000. 3. That the company had contracted to buy estate *B.* The facts were:—1. That *S.*, the promoter of the company, had signed document applying for more than half the shares for himself or his nominees, but he had paid no deposit on the shares, and he ultimately took only 200 shares, the rest having been allotted to general applicants. 2. That *S.* had not spent anything on estate *A.*, but had agreed to buy it from vendors who were alleged, but not proved, to have spent £70,000 upon it. 3. That there was no binding contract as to estate *B*, but that *S.* had arranged terms with the owners on which they would be willing to sell to him, and had also arranged terms on which he would sell to the company if the allotment of shares took place:—

Held, that, under the circumstances, the Plaintiff, who had taken shares on

the faith of the prospectus, and had filed his bill before any proceedings for winding up the company, was entitled to be relieved from his shares on the ground of misrepresentations in the prospectus.

Decree of *Wood*, V.C., affirmed.

L. C.
1868
Ross
v.
Estates Investment Company.

THIS was a suit instituted against the *Estates Investment Company, Limited*, and the directors, and *William Sarl*, in order to set aside an allotment to the Plaintiff of ten shares in the company, on the ground that he had been induced to take the shares by statements in the prospectus issued by the directors, which were fraudulent and untrue. These statements were:—1. That more than one-half of the shares had been allotted: the fact being that there were 5000 shares in the company, and that *Sarl*, the promoter of the company, had signed a document of application for 2510 shares to be allotted to him or his nominees, on an understanding that *Sarl* himself would not be called upon to take any shares, and that they were to be allotted to applicants if a sufficient number of shares were applied for; he paid no deposit on the 2510 shares, and a sufficient number having been applied for, he only took 200. 2. That the company had contracted for the purchase of the *Selhurst* estate, on which upwards of £70,000 had been expended by the vendors: the fact being that the company had contracted with *Sarl* for the purchase of the estate; that *Sarl* had himself spent nothing on the estate, and had merely contracted to purchase it from the owners, who were alleged, but not proved, to have spent the money on the estate. 3. That the company had agreed to purchase an estate at *Leytonstone:* the fact being that the owners of the estate were ready to sell to *Sarl*, in the event of the company being formed and the allotment being made, and that he was ready to sell to the company, but that no actual contracts for sale existed. The company was in existence when the bill was filed, and no proceedings had then been taken for winding up the company. The facts of the case are more fully set out in the report of the hearing before the Vice-Chancellor *Wood* (1), and some further facts on which the Lord Chancellor relied are fully set out in his judgment.

The Vice-Chancellor *Wood* made a decree relieving the Plaintiff from his shares.

(1) Law Rep. 3 Eq. 122.

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All the Defendants appealed.

Mr. *Druce*, Q.C., and Mr. *Marten*, for the directors:—

The representations in the prospectus were not untrue. *Sarl* had agreed to take the shares, and was bound to take them. He had also agreed to buy the *Leytonstone* estate, and had handed over the contract to the company. The Plaintiff does not attempt to say that the £70,000 had not been spent, and it cannot signify whether *Sarl* or his vendors spent it. At all events the directors knew nothing about it, and were deceived by *Sarl*. A shareholder cannot escape upon such small grounds: *Hallows* v. *Fernie* (1); *Kennedy* v. *Panama Mail Company* (2). The statement as to the *Leytonstone* estate is correct.

Mr. *Cracknall*, for *Sarl*.

Mr. *Higgins*, for the company.

Sir *Roundell Palmer*, Q.C., Mr. *Cotton*, Q.C., and Mr. *Everitt*, for the Plaintiff:—

The prospectus must have been intended to convey the impression that 2510 shares had been *bonâ fide* subscribed for by the public, and not that many of the applicants would be put upon *Sarl's* list, and merely relieve him. *Sarl's* subscription was a mere blind. As to the *Leytonstone* estate, the directors must have known that there was no contract. The defence that the directors were not aware of the facts has never prevailed: *Rawlins* v. *Wickham* (3); *In re Reese River Company, Smith's Case* (4).

Mr. *Druce*, in reply.

July 22. LORD CAIRNS, L.C.:—

The question in this case is merely between the Plaintiff and the company, and there is no question as to any rights of creditors, for there was not at the time when the decree was made any appli-

(1) Law Rep. 3 Ch. 467.
(2) Ibid. 2 Q. B. 580.
(3) 3 De G. & J. 304.
(4) Law Rep. 2 Ch. 604.

cation pending for the winding up of the company. I may also say that if the Plaintiff would upon other grounds have been entitled to repudiate the contract under which he became *de facto* a shareholder in the company, he has not lost that right in consequence of any delay. His repudiation took place at the earliest moment after the facts upon which he rests his claim for relief were ascertained, and was followed up by his filing this bill without allowing any delay to intervene.

The grounds upon which the Vice-Chancellor sustained the claim of the Plaintiff to repudiate the ten shares taken by him in the company were three in number, inasmuch as three statements were made in the prospectus of the company which were held by the Vice-Chancellor to be inaccurate, and to have been made either fraudulently, or in such a way as to entitle the Plaintiff when he discovered their inaccuracy to repudiate his shares.

The first of these statements was made in this way:—The company was stated in the prospectus to be a company with a capital of £250,000 in 10,000 shares of £25 each, £1 to be paid on application, and £4 on allotment; and then followed these words: "First issue, 5000 shares, of which more than half has been subscribed," those latter words appearing in a different character of type, and being printed in red ink. Then at the end of the prospectus there was a statement that "more than half the first issue of the shares has been already subscribed for, and applications for the remaining shares must be made in the annexed form, accompanied by a deposit of £1 per share." Now, there had not at that time been any allotment of shares in the company, nor any application for shares in the ordinary form in which applications for shares are made, nor had there been any subscription unless the document signed by *Sarl* amounted to a subscription within the meaning of the words which I have read.

[His Lordship then stated the circumstances under which *Sarl* signed the document:—]

It is to be observed with regard to this transaction, in the first place, that no money whatever was paid by *Sarl* by way of deposit upon these shares. It would not have been an unnatural conclusion to have drawn from the prospectus that as the form of allotment or application for shares included the payment of £1

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per share at the time of application, and involved the readiness to pay £4 more, at all events, if more than 2500 shares were subscribed for, the company was actually in possession of upwards of £2500 in actual money, and had obtained a constituency who were ready upon allotment to make the further payment of £4 per share as soon as the shares were allotted.

I may also observe that, taking the document signed by *Sarl* in the most favourable way for the company, *Sarl* might under it have claimed complete and entire exoneration from any liability whatever, on presenting to the company the names of any nominees—mere paupers if he pleased—whom he would supply to the company as persons to whom the shares were to be allotted.

Further than this, I think that this document must be read in connection with the proceedings of the directors at the board meeting on the same day. [His Lordship then commented on the resolutions passed by the directors, and came to the conclusion that it never was intended that there should be any serious responsibility imposed on *Sarl* by this document, which would not afford the means of holding *Sarl* to any contract himself to take 2510 shares in the company; and further, that the directors wanted to get the public to take not merely the 2490 remaining shares, but the 2510 shares also, and so to relieve *Sarl* from any fancied responsibility in consequence of his having signed this document.] There was no real allotment, and neither *Sarl* nor the directors thought that there was an allotment, either present or future, to *Sarl*. The object was to be able to insert in the prospectus the statement, which clearly was thought to be one of vital importance as inducing persons to take shares, and the apparent subscription of *Sarl* for 2510 shares was made to play a double part—first, to enable the company to represent that 2510 shares had been allotted, and then by means of that same misrepresentation to get those same 2510 shares taken by the public. The directors probably, when they came to allot the shares, did not care whether they were allotting the 2510 shares included in *Sarl's* application, or were allotting the residue. They thought that the whole 5000 shares had to be allotted, and that customers would be found for them, and they did not pay the least attention as to

whether they were marked as being allotments in respect of the 2510 shares or in respect of the remainder. I am sorry to be obliged to say that I think this was, in the eye of this Court, a fraud on the public, one which I should regret to see this Court attempting in any way to justify or to cloak.

The second ground on which the judgment of the Vice-Chancellor rested, was the statement as to the *Selhurst Park* estate, which concludes thus:—"The company has contracted for the purchase of the under-mentioned well-known estates, which, for importance of locality cannot be surpassed, viz.:—No. 1. This is a freehold estate at *South Norwood*, known as the *Selhurst Park* estate. Upwards of £70,000 have already been expended upon this estate by the vendor, on buildings and improvements, in addition to the purchase-money paid by him for the land." Now, who was the vendor of the estate? Beyond all doubt the person who had contracted for the sale to the company, as mentioned in the preceding sentence. It means that, or it means nothing; and it seems perfectly clear from the minutes of the directors that "vendor" was the designation which Mr. *Sarl* received in their own documents. Therefore, this is a statement that the vendor of the *Selhurst Park* estate, namely, *Sarl*, had spent £70,000 on the property. Now it was not suggested that there was any foundation for that statement. It is clear that *Sarl* had not spent one shilling on it, and had never been in possession of it in any way. It was said that the money had been spent by the person or persons who were the vendors to him, and who had not at that time conveyed the legal estate, but still remained the owners though they had contracted to part with it to *Sarl;* and the argument was, that it would have been the same thing whether they had spent the money or *Sarl* had spent it. I am very much disposed to agree with that view, and to say that if it were proved that the persons who sold to *Sarl* had spent £70,000 on this property, then although the statement in the prospectus would not have been exactly accurate, still I do not quite follow the conclusion of the Vice-Chancellor in thinking that any real injury would have been done to the Plaintiff. I cannot see that it made any difference whatever to the Plaintiff whether the money had been spent by *Sarl* or by those who were his immediate vendors, and who, if the money was spent at all,

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had spent it in recent times, immediately before the contract with *Sarl*.

But there is no proof whatever that any money had been spent by those who sold to *Sarl*. The way that the absence of that proof is attempted to be met is this:—It is said that this is a suit to impeach a concluded transaction on the ground of fraud, and that it lies on the Plaintiff to allege and prove the fraud on which he relies; and that the proof should come from him and not the disproof from the Defendants. I think there is a fallacy in that statement as applied to the present circumstances. The Plaintiff has proved his case, that *Sarl* had not spent the £70,000. This is admitted, and then it is for the Defendants to prove their case, that though *Sarl* did not spend the £70,000, *A.*, *B.*, *C.*, or *D.* who sold to *Sarl* did spend that money. If they did prove this, it might be a good defence; but the onus is on them to prove it. They come in the shape of confessing and avoiding, and having confessed they must, in order to avoid the consequences, prove what they allege. I think, therefore, there being no evidence whatever that the money was spent by the vendors to *Sarl*, that on the second ground also the Plaintiff has established his case.

I come now to the third ground, as to the *Leytonstone* estate. The allegation as to that is this:—"The *Estates Investment Company* has contracted for the purchase of the following well-known estates, No. 2, the *Leytonstone* estate." Now the facts as to that estate are these in substance: *Sarl* never had been in possession of the *Leytonstone* estate. He had no contract for the purchase of it which bound any person. He had been in negotiation with the owner of the estate, and the negotiation had gone so far that terms had been laid down, which it was said that each party was willing to enter into, and a contract had accordingly been prepared in writing and approved of by the solicitors on both sides. That was several months before the prospectus was issued. But so far from the owner of the estate binding himself by signing the contract, he during these intervening months abstained from signing it, clearly shewing that he did not wish to put himself in the hands of *Sarl*, or to constitute him in equity the purchaser of the estate, although the vendor might have been quite willing that the company, if formed, should become the purchasers.

Therefore, as regards *Sarl*, he had no more power over the estate than any one of the directors themselves had.

Then a question was raised, whether the directors knew that this was the state of the case as to this property? All that I find in their answer is, that they say they did not know anything about the title to the property. That appears to me to fall very short of an allegation that they did not know the facts; and I cannot help arriving at the conclusion that they perfectly well knew that *Sarl* was simply a speculator with regard to this property, who, in substance, told the company, "If you can supply me with £45,000 I am pretty sure I shall be able to get the property from the owner of it, by entering into a contract with him as soon as I am in a position to shew him I have got the money." That was exactly the true position of the matter, and I cannot think that the directors were ignorant of the true state of the case.

But the matter does not rest there. They state that they have contracted for the purchase of this estate; but there was no complete and concluded contract with *Sarl*, and the whole thing was to become null and void unless the allotment was made consequent on the issue of the prospectus. Therefore, here again it seems to me there is a repetition of the form, a little varied, of what was done with regard to the allotment of shares. The form of preparing and sealing a contract is gone through. That contract is put into a state in which it is to have no operation, except in certain events. It is to be represented to the public as a completed contract for the purchase of the estate. If the public, induced by that representation, come in and take the shares, the contract then is to spring into life and reality; but if the representation to the public fails to induce them to take the shares, the contract is to become null and void, and to have no effect whatever.

I think that the Court cannot sanction such a course; and although if the matter had stood on that one circumstance alone, I should have had more doubt as to whether relief should be given to the Plaintiff; still, I have no doubt whatever that upon the first and second grounds I have mentioned he is entitled to relief. The decree is altogether right as regards the main relief in the case, and the appeal must be dismissed with costs.

But it seems that, probably *per incuriam*, the decree has ordered

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that Mr. *Sarl* shall not only pay the costs of the suit, that is to say, be jointly and severally liable for the costs of the suit, which I think is quite right, but further, that he shall be jointly and severally liable for the repayment of the £10 which was paid as a deposit for the Plaintiff's shares. That money was not paid directly to him, nor was he in any way the custodian of it. That direction must have crept into the decree by an oversight, and it ought now to be varied. But that will not make any alteration with regard to the costs of the appeal, which must be paid by the Appellants.

Solicitors: Mr. *H. Harris;* Messrs. *Stevens, Wilkinson, & Harries;* Messrs. *Batt & Son.*

MATHEWS *v.* KEBLE.

L. JJ.
1868
June 22, 23.

Accumulations—Thellusson Act (39 & 40 *Geo.* 3, *c.* 98)—*Direction to invest Surplus—Portions—Provision for Debts—Bond Debt—Interest charged in excess of Penalty.*

A testator directed that his trustees should apply as much as might be necessary of the income of his residuary personal estate for the maintenance of his son (a lunatic) for life, and upon further trust to invest any surplus, and to treat it as part of the testator's personal estate; and after his son's death he gave his personal estate to his son's children, and in default of issue to two other persons.

By a codicil he directed that two bond debts, and all other debts which should be due from *B. S.*, one of the residuary legatees, should not be payable unless and until his share of the residue should become vested, and that the amount of the debts and interest should then be deducted from his share.

Shortly after the date of this codicil *B. S.* gave the testator a bond for £8000, conditioned to be void if *B. S.* should pay £4000, with lawful interest, within three months after his taking an absolute interest in a moiety of the residue, his interest being contingent during the life of the testator's son. *B. S.* lived to acquire an absolute vested interest:—

Held (affirming the decision of *Stuart*, V.C.), first, that there was an express direction to accumulate, and that the accumulations beyond the period of twenty-one years from the testator's death were void, and belonged to the testator's next of kin.

Secondly: That the accumulations were not within the exceptions in the *Thellusson Act* respecting portions for children or provision for debts:

Held, also (reversing the decision of *Stuart*, V.C.), that *B. S.* must be charged with the full amount of interest on the first two bonds from their respective dates, although the amount of interest, together with the principal, exceeded the penalty of the bonds:

But *held*, that on the third bond he was chargeable with interest only from the time when he acquired a vested interest in the residue.

THIS was an appeal from a decision of Vice-Chancellor *Stuart* (1).

Jonathan Sorsbie, by his will, dated the 9th of November, 1816, gave to three trustees all his freehold property during the life of his son, *Jonathan James Sorsbie*, upon trust to manage the same, and to apply the whole rents, deducting taxes and repairs, towards the maintenance and support of his said son during his life, and after his decease, then to the use of the first and other sons of his said son; and in default of such issue to the use of the daughters of

(1) Law Rep. 4 Eq. 467.

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his said son. And the testator, after bequeathing certain legacies and annuities, as to the rest and residue of his personal estate gave and bequeathed the same to *W. Clarke* and *B. Sorsbie* upon trust to convert and invest the same, and upon trust to apply the interest, dividends, and proceeds, or so much of them as might be necessary, for or towards the maintenance and support of his said son, *Jonathan James Sorsbie*, during the term of his natural life; and for supplying him with every comfort and convenience which his situation might require; and upon further trust to lay out and invest in the public funds, or upon real security, any surplus which might from time to time remain of and from the said interest, dividends, and proceeds after such application as aforesaid; and to treat and consider such surplus in all respects as part of the testator's personal estate and effects. After the death of *J. J. Sorsbie*, the testator gave the residue to *J. J. Sorsbie's* children, and in case of his dying without issue he directed it to be divided, after paying a legacy of £2000, between *Benjamin Sorsbie* and another person.

The testator made three codicils to his will, by the third of which he declared that the several debts or sums of money due and owing to him from *Benjamin Sorsbie*, and mentioned in the respective codicils to his will, as well as any other debt or debts, sum or sums of money, which should be owing to him from the said *Benjamin Sorsbie* at the time of his decease, should not be required under any circumstances to be paid, or considered as due or payable, by the said *Benjamin Sorsbie*, his heirs, executors, or administrators, unless and until the contingent share, estate, and interest in his, the testator's, real and personal estate given to the said *Benjamin Sorsbie*, his heirs, executors, and administrators, by his codicil should become a vested estate and interest by the death of the said *Jonathan James Sorsbie* without issue, as in the said will is mentioned; and that upon the happening of that event, the said debts and sums of money then due to the said testator or his executors, from the said *Benjamin Sorsbie*, his heirs, executors, or administrators, and all interest thereon, should be a charge upon and deducted from the share of him, the said *Benjamin Sorsbie*, his heirs, executors, or administrators, of and in the said testator's real and personal estate and effects, so given to the said *Benjamin*

Sorsbie by the said will. And the testator thereby directed that the said *Benjamin Sorsbie*, his heirs, executors, or administrators, should in the meantime pay legal interest upon all the said debts or sums of money half-yearly.

The testator died on the 9th of December, 1821, leaving *J. J. Sorsbie* him surviving, who at his death was of weak intellect, and was found lunatic by an inquisition in 1822. *William Clarke* was appointed his committee, and on his death the Defendant *Keble* was appointed committee, and an annual sum of £525 allowed for the maintenance of the lunatic, which did not exhaust the income.

On the 9th of December, 1842, being twenty-one years after the testator's death, the residuary personal estate had accumulated from £11,986 9*s.* 2*d.*, consols, the amount at the testator's death, to £31,200, and at the death of the lunatic on the 4th of July, 1864, to £56,800.

Benjamin Sorsbie had given to the testator three bonds, one dated the 31st of August, 1819, in a penal sum of £4200, to secure £2100, with interest at £5 per cent.; a second, dated the 1st of January, 1821, in a penal sum of £2800, to secure £1468; and a third, dated the 31st of January, 1821, being two or three days after the date of the third codicil, in a penal sum of £8000, subject to a condition for making void the same if *Benjamin Sorsbie* should pay the sum of £4000, with legal interest for the same within three months next after *Benjamin Sorsbie* should take an absolute interest in one moiety of the clear residue of the personal estate of *Jonathan Sorsbie* under his will dated the 9th of November, 1816.

Benjamin Sorsbie paid interest on the two bonds first mentioned till 1836, but had failed to pay subsequent interest. On the last-mentioned bond he never paid interest. On the 7th of December, 1864, this bill was filed to administer the testator's estate, and on the 18th of February, 1865, an administration decree was made directing certain inquiries. By his certificate, the Chief Clerk found, *inter alia*, that there was due for principal and interest from *Benjamin Sorsbie* upon the said bonds, up to the 18th of February, 1865, the sum of £21,328 15*s.* 5*d.*

Two points were raised on further consideration: first, whether the direction to invest the surplus was a direction to accumulate

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which was void beyond the period prescribed by the *Thellusson Act;* and, secondly, whether *Benjamin Sorsbie* ought to be charged with interest beyond the amount of the penalties of the bonds.

The Vice-Chancellor held that the direction to invest the surplus was void beyond the period of twenty-one years from the testator's death, and that the testator's next of kin were entitled to the accumulations: and with respect to the bonds, he held that nothing beyond the penalties was to be deducted from *B. Sorsbie's* share.

From this decision *Benjamin Sorsbie's* assignees, and also the next of kin, appealed. The questions as to the accumulations were first argued.

Sir *Roundell Palmer,* Q.C., Mr. *Bacon,* Q.C., and Mr. *Leonard Field,* for the assignees of *Benjamin Sorsbie:*—

We contend, in the first place, that these accumulations are not within the *Thellusson Act,* because they arise by operation of law, and not by the express direction of the testator: *Griffiths* v. *Vere* (1); *Elborne* v. *Goode* (2); *Lombe* v. *Stoughton* (3); *Corporation of Bridgnorth* v. *Collins* (4); *Bryan* v. *Collins* (5).

The case of *Tench* v. *Cheese* (6) is not applicable, because here the accumulation does not necessarily take place by reason of the form in which the property is given. The trustees have a discretion as to the amount applicable to the maintenance of the tenant for life, and the testator clearly contemplated that his son would recover his reason, in which case he would have been entitled to the whole income.

Secondly: If these accumulations are within the *Thellusson Act,* they are saved by the 2nd section, which excepts portions for children: *Middleton* v. *Losh* (7); *Beech* v. *Lord St. Vincent* (8); *St. Paul* v. *Heath* (9).

Thirdly: This is a provision for payment of *Benjamin Sorsbie's* debt, and on that account also is saved by the 2nd section of the

(1) 9 Ves. 127.
(2) 14 Sim. 165.
(3) 12 Ibid. 304.
(4) 15 Ibid. 538.
(5) 16 Beav. 14.
(6) 6 D. M. & G. 453.
(7) 1 Sm. & Giff. 61.
(8) 3 De G. & Sm. 678.
(9) 13 L. T. (N. S.) 271.

Thellusson Act: Viscount Barrington v. *Liddell* (1); *Varlo* v. *Faden* (2)

[The following cases were also referred to: *Drewett* v. *Pollard* (3); *Burt* v. *Sturt* (4); *Watt* v. *Wood* (5); *Edwards* v. *Tuck* (6); *Jones* v. *Maggs* (7); *Bourne* v. *Buckton* (8).]

Mr. *Greene*, Q.C., Mr. *Davey*, and Mr. *Townsend*, for the next of kin, were not called on.

Mr. *Bazalgette*, Q.C., and Mr. *G. Murray*, for the Defendant *Keble*.

SIR W. PAGE WOOD, L.J.:—

On these points I think we ought to affirm the decision of the Court below. The first question is, whether this provision falls within the scope of the *Thellusson Act*.

The Vice-Chancellor treated the provision, and we think correctly, as a plain direction to accumulate. It is quite true the actual amount which is to be accumulated is not specified; it may be much, or it may be nothing at all, but what the trustees are directed to do is this:—Having first applied what they think is necessary for *J. J. Sorsbie*, they are to lay out and invest in the public funds or upon real security any surplus which might from time to time remain of the income after such application, and to treat and consider such surplus in all respects as part of the testator's personal estate and effects. So that as soon as they made their first investment of one year, that would become capital of the testator's personal estate, and the income of that would be income of the personal estate resulting from the whole fund, consisting of the already existing personal estate and that which had been so invested; and what was not wanted of that income would have to be again invested under this trust. It is, in fact, a positive and distinct direction to accumulate.

With respect to the authorities which have been cited, it is not

(1) 2 D. M. & G. 480.
(2) 27 Beav. 255.
(3) Ibid. 196.
(4) 10 Hare, 415.
(5) 2 Dr. & Sm. 56.
(6) 3 D. M. & G. 40.
(7) 9 Hare, 605.
(8) 2 Sim. (N.S.) 91.

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necessary now to go into them. It is sufficient to observe that there is a very reasonable and plain distinction between this case and the class of cases which Lord *Eldon* referred to in *Griffiths* v. *Vere* (1), where the property being that of an infant, the accumulation is to be assumed to be the act of the Court. The distinction between such accumulations and accumulations by will has been pointed out in more than one case. If it is necessary, where the infant's property is small, the Court often applies the whole of the capital, or as much as is required, for his benefit. The Court is managing the infant's property, and it is simply the circumstance of the law not allowing infants to dispose of their property which occasions any accumulation. And I may observe that since the *Thellusson Act* the periods for accumulation of this kind have varied, because before the last *Wills Act* an infant might have disposed of personal estate by will at an earlier period than he could have disposed of it by an act *inter vivos*. Therefore, in this case, it appears to us that the Vice-Chancellor came to a correct conclusion in saying that there is a direction to accumulate.

Then, with respect to the question of contingency. The simple question is, what is the meaning of contingent. My learned brother called the attention of counsel during the argument to a passage of Lord *Cranworth's* judgment in *Tench* v. *Cheese* (2), in which he says:—"The leaning of my opinion is, that if I had to decide the point I should hold that if a testator directs his property to go in such a course that, upon certain contingencies, there must be an accumulation beyond twenty-one years, he does direct that, upon those contingencies, the accumulation shall take place beyond that time." That is merely a *dictum*, but it seems consonant with good sense that what a person has directed shall happen in a certain contingency is a direction when the contingency happens. It is, therefore, when the contingency happens a direction for partial accumulation. In that way there is a direction which exceeds the period allowed by the *Thellusson Act*.

The next question raised was, whether this provision was covered by the exception as to portions. I think, however, the question concluded by the later authorities, not merely that of *Viscount Barring-*

(1) 9 Ves. 127, 136. (2) 6 D. M. & G. 453, 462.

ton v. *Liddell* (1), but the two last cases which were followed by the Master of the Rolls in *Drewett* v. *Pollard* (2). I refer to *Burt* v. *Sturt* (3), and *Edwards* v. *Tuck* (4). In the last mentioned case, which was heard before Lord *Cranworth* and the Lord Justices, it was distinctly held that in a case like the present, where the property was simply divided amongst all the members of the family, it could not be considered as a portion. That case seems, in every respect, to be quite as strong as that which we have before us.

With regard to its being a trust for the payment of debts, it would be a very forced construction of this will to say that this is a provision for the payment of debts. Sir *Roundell Palmer*, in arguing this point, called in aid what was said in the case of *Tench* v. *Cheese* (5), namely, that if the consequence of what the testator has said leads to an accumulation, the Court must hold that to have been the testator's intention; but I think that is a *dictum* which cannot be applied to shew an intention to provide for debts in a will like this, which is a plain and distinct provision to accumulate during the whole of the son's lifetime for the benefit of his son's children if he should have any, with a clear gift over to *William Clarke* or to *Benjamin Sorsbie* in equal shares. And it was not till a subsequent period, while framing his codicils, that it occurred to him that it would not be convenient for his son to make early payment of those debts which were owing to him, and he therefore makes the provision contained in the third codicil:—[His Lordship then commented on the words of the codicil, and continued:—] The whole question here is, as is well expressed by the Master of the Rolls in the case of *Varlo* v. *Faden* (6), whether it was the *bonâ fide* object of the testator's direction to make provision for the payment of the debt. I do not think there is a *bonâ fide* intention in this case to make a provision for the debt. This debt appears to have been in no way within his purview at the time of making his will; nor does it seem to me, in truth, that the accidental result, which may or may not happen, of the payment of the debt out of the accumulations, can be taken to

(1) 2 D. M. & G. 480. (4) 3 D. M. & G. 40.
(2) 27 Beav. 196. (5) 6 Ibid. 453.
(3) 10 Hare, 415. (6) 27 Beav. 255.

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be a provision made by this testator, in directing the accumulation, for the payment of another person's debt.

I think, therefore, upon all these points the appeal must fail.

SIR C. J. SELWYN, L.J.:—

Upon the first point I think that the direction contained in this will for laying out and investing this surplus is within the words and also within the spirit of the *Thellusson Act*. By the will of the testator the gift of the *corpus* necessarily remains in contingency until it shall be ascertained, at the death of the son, whether he has left any child, and in the meantime, after directing as much as would be necessary to be applied to the maintenance and support of the son, the testator creates an express trust for laying out and investing, as the trustee thinks fit, any surplus which might from time to time be made. Under those circumstances that trust for laying out and investing during the life of the son could be nothing else but a trust for accumulation. Accordingly, in my judgment, it comes entirely within the words and the spirit of the Act.

It has been said that, inasmuch as the amount is variable, and subject to be changed from time to time in the discretion of the trustees, the Act does not apply; but it is obvious, if the Act had been limited to cases in which nothing but a certain or invariable amount is directed to be accumulated, all cases where simple payments are to be made for the benefit of the family or the estate, as, for instance, for repairs, all of which must necessarily be within the discretion of the trustees, would be excluded from the operation of the Act. I think there is neither authority nor principle to be found in support of such a proposition.

The other objection, that this is subject to a certain contingency, has been disposed of by my learned brother, and by a reference to Lord *Cranworth's* observations on the case of *Tench* v. *Cheese* (1).

It is then said that the case comes within the exceptions in the 2nd section. With respect to the first exception relating to portions, I think that question is so entirely concluded by authority that it would be merely a waste of time to add anything further upon it.

(1) 6 D. M. & G. 453.

With respect to the third point, whether it comes within the other exception relating to the payment of debts by any other person than the grantor, settlor, or devisor, we have been very much pressed by the authority of the case of *Varlo* v. *Faden* (1). I think that case affords a very useful illustration by way of contrast to the present case. That was a case where provision was directly made for the purpose of defeating the contingency to which property, and especially such hazardous property as that of a newspaper proprietor, must largely be exposed. But here there is no such contingency, and no such provision in the will at all. Even in that case the Master of the Rolls carefully guards his judgment by saying that the provision must be *bonâ fide*. In the present case the investment and the accumulation fund are given to the children of the testator without any provision for the payment of the debt, and it cannot be said that because, in a contingent event, the testator has given one moiety of the *corpus* of the residuary estate to *Benjamin Sorsbie*, and has made a certain provision for setting off what may be due from him under these bonds against that one-half of his contingent interest in the residue, that is a *bonâ fide* provision for the payment of the debt. I think that this case does not come within any of the exceptions to the statute, and that therefore the appeal, as to this point, must be dismissed with costs.

The question respecting the interest on the bond debts was then argued.

Mr. *Greene*, Q.C., Mr. *Townsend*, and Mr. *Davey*, for the Appellants, referred to *Courtenay* v. *Williams* (2); *Clarke* v. *Lord Abingdon* (3); *Atkinson* v. *Atkinson* (4); *Hughes* v. *Wynne* (5); *Roffey* v. *Greenwell* (6).

Mr. *Bacon*, Q.C., and Mr. *Leonard Field*, for *Benjamin Sorsbie's* assignees.

Mr. *Greene*, in reply.

(1) 27 Beav. 255.
(2) 3 Hare, 539.
(3) 17 Ves. 106.
(4) 1 Ball & B. 238.
(5) 1 My. & K. 20.
(6) 10 Ad. & E. 222.

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SIR W. PAGE WOOD, L.J.:—

With reference to the third bond, we must first look to the instrument itself. We must also look at the will, because it is introduced into the instrument, but I think that looking at the will tends to fortify the construction which we should have placed upon the bond standing *per se*. The strongest way of putting the case in favour of the claimants, who say that upon this bond interest is to run from the date and not from any other period, is, that the bond itself may be taken as an admission of a debt due at that time, and that the condition operates only by way of agreement to postpone the payment of the debt. But we must look to the whole character and nature of the transaction, and we find that there is "the full sum of £4000 to be paid, with legal interest for the same, within three months after the said *Benjamin Sorsbie* shall take an absolute interest under the will." At once there arises on the face of the bond the ambiguity which arose in *Roffey* v. *Greenwell* (1). Two periods are mentioned, the bond is to be paid within three months after *Benjamin Sorsbie's* coming into an absolute interest, and here we have to look at the will only for the purpose of ascertaining the date. On looking at it, we find that he comes into an absolute interest only in the event of the son of the testator dying without leaving issue. The bond then is to be paid within three months after that date. In *Roffey* v. *Greenwell* the Court went on three grounds; first, that *primâ facie* a promissory note payable at a fixed time would bear interest from its date, the implication being that the sum is in hand; secondly, that the instrument ought to be construed most strongly against the maker; and thirdly, that if he had intended interest to be calculated only from the death he would have expressed his intention more clearly. Here we have an instrument as to which there is no trace of any money having passed, though there is an allusion to some sort of consideration. But we do not find, on looking to the defeasance, that there was a clear intention to create a debt at all, for if issue had been born to the son the obligor could not have taken an interest, and no debt would have been created. This consideration does away with a great deal of the reasoning applicable to the case of the promissory

(1) 10 Ad. & E. 222.

note, which of itself implied a money consideration. It would be strange to say, there being an event which might happen on which there would be no debt at all, that, if the debt arose, interest was to be paid from a period preceding the event on which it was to arise; but there is no inconsistency in construing the instrument as binding the obligor to admit a debt in the event of *A. B.* dying without issue, and to pay it within three months after that event, with lawful interest from that event.

If we look to the scope of the will, and the whole of the surrounding circumstances, the case of *Benjamin Sorsbie* is much strengthened. The testator appears, by his will, and each of his codicils, to have been desirous that *Benjamin Sorsbie* should not be pressed for any moneys due from him to the testator, but that interest should be payable in the meanwhile upon these debts. The bond was made two or three days after the date of the last codicil, which must, therefore, have been fresh in his memory, and in which he made provisions as to debts, and excused none of them, but shewed no intention of creating debts. He directed that the debts should not be sued for, but that interest should be paid in the meantime. That cannot be considered applicable to an instrument which could not be sued on till the happening of a particular event. This makes an important difference between this case and *Roffey* v. *Greenwell* (1). It appears to me that it was the intent of this instrument that no debt should accrue before the event happened, and that if it did happen, then the debt was not to be paid for three months, but was to be paid with interest from the time of the event happening.

As regards the other case, the question depends simply upon the will and codicil, and seems to turn upon this plain principle of justice, that a man cannot approbate and reprobate. The testator gives *Benjamin Sorsbie* the advantage of not paying certain sums owing upon the bonds until a deferred time, but he expressly imposes upon him in the same breath a condition that he is to pay interest in the meantime. It was put to Mr. *Bacon* by my learned brother, "Supposing that the trustees had done their duty and sued, how could this question have arisen?" and the only answer that could be given was, that they have not done so, which amounts

(1) 10 Ad. & E. 222.

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to this, that *Benjamin Sorsbie* seeks to be excused from payment because the trustees have committed a breach of trust. *Benjamin Sorsbie* must be treated as having received the interest in part payment of his share of residue. The third codicil makes the matter extremely plain. The testator directs that *Benjamin Sorsbie* shall not be sued for the debts, but that in the meantime, during all the time that he has not been called upon for payment, he shall pay legal interest for all moneys due from him. He has not done so; he has had the principal and paid no interest, and it must be deducted. There must be a declaration that interest is to be calculated upon the sums secured by the first and second bonds from their dates, and from the death of the son on the principal sum secured by the third bond.

SIR C. J. SELWYN, L.J.:—

I also think, upon the construction of the third bond, that there is a very clear distinction between the case of *Roffey* v. *Greenwell* (1) and the present case. It is admitted that if the son of the testator had had children capable of taking under the residuary bequest, and if, consequently, *Benjamin Sorsbie* had never acquired any vested interest in any part of the residue, the money mentioned in the bond would never have become payable at all. That clearly distinguishes the case from *Roffey* v. *Greenwell*, where the Court felt themselves bound to conclude that there was an absolute debt and an absolute promise to pay.

With respect to the other point, the whole question to be decided is simply a question upon the construction of the will and codicil. We have been asked, on behalf of the Appellant, upon what principle we can hold that more than the penalty of the bond can be recovered. My answer is—upon the very clear and plain principle that the Court will not allow a person who claims as a volunteer a share of the residue bequeathed by the will, and who, according to the terms of it, ought in each half-year to have paid a sum of money which, when paid, would have been part of the testator's estate, to be in a better position than he would have been in if he had complied with the conditions of the will. In the view of

(1) 10 Ad. & E. 222.

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this Court he must be taken to have already received those sums of money which but for his default would have formed part of the testator's estate.

Solicitors for the Assignees of *Benjamin Sorsbie*: Messrs. *Field, Roscoe, & Co.*

Solicitor for the Defendant *Keble*: Mr. *Biggenden.*

Solicitors for the Next of Kin: Messrs. *Townsend, Lee, & Houseman.*

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June 30;
July 1, 4, 30.

Mortgage of Share in a Newspaper—Copyright—Priority—Equities between Partners.

A suit was instituted between *B.* and *H.* as to the proprietorship of a newspaper, in which it was ultimately decided that they were entitled in equal moieties. During the progress of the suit *B.* assigned his share in the newspaper, and the right of publication, and in the profits thereof, to *W.* The assignment contained a recital of the proceedings in the suit, and a power of sale. Afterwards *B.* mortgaged the same share to his partner *H.* to secure sums due to *H.* in respect of that share. *W.* registered his assignment at *Stationers' Hall* under the provisions of the *Copyright Act*, and subsequently sold the mortgaged share to the Plaintiff under his power of sale. Both *W.* and the Plaintiff permitted the newspaper to be carried on by *B.* and *H.* jointly. On a bill filed by the Plaintiff for a declaration that he was entitled to a moiety of the newspaper:—

Held, first, that there is nothing analogous to copyright in the name of a newspaper, and therefore the registration of the assignment at *Stationers' Hall* was futile; but that the proprietor has a right to prevent any other person from adopting the name, and that this right is a chattel capable of assignment.

Secondly: that as *W.* and the Plaintiff knew of the suit between *B.* and *H.*, and also permitted them to carry on the newspaper as partners, the Plaintiff could only take *B.'s* share subject to the equities subsisting between the partners.

The decree of *Stuart*, V.C., varied.

THIS was an appeal from a decree of Vice-Chancellor *Stuart.* (*a*)

The suit related to the property in the *Sporting Life* newspaper. The Plaintiff was *Edward Robert Kelly;* and the Defendants, *John Hutton* the elder, *John Hutton* the younger, and *William McMurray.*

(*a*) See 3 H. & M. 70

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On the 30th of August, 1862, *Samuel Orchard Beeton* was entered in the Inland Revenue Office as the sole proprietor of the *Sporting Life* subject to a mortgage to *McMurray*. Subsequently a suit and cross-suit of *Hutton* v. *Beeton* and *Beeton* v. *McMurray* were instituted, in the former of which *Hutton* the elder claimed to be entitled to one-half of the *Sporting Life*, and in the latter *Beeton* claimed to be entitled to the whole. Vice-Chancellor *Stuart* made a decree declaring that *Beeton* was entitled to the whole property in the newspaper; but on the 1st of August, 1864, the Lords Justices reversed the decree, and declared that *Hutton* the elder and *Beeton* were entitled to the newspaper and the copyright and type thereof, and the leasehold property mentioned in the pleadings, in equal moieties, subject, as to each moiety, to such pecuniary charges or lien as the owner of the other moiety, or *McMurray*, might have thereon respectively; and it was ordered that all proper parties should take all necessary steps for registering the newspaper in the joint names of *Hutton* the elder and *Beeton*, subject to charges on both shares in favour of *McMurray*. Various accounts and inquiries were also directed, and *Beeton* and one *Dorling* were restored as managers and receivers of the newspaper till further order, without prejudice to any question as to the sale of the copyright of the newspaper and other particulars, and further consideration was reserved.

During the pendency of the proceedings *Beeton* executed an agreement dated the 14th of July, 1863, and a mortgage deed dated the 21st of April, 1864, by which he assigned his share in the newspaper, and the copyright and right of publication thereof, and all profits arising therefrom, to Messrs. *Wrigley & Son*, paper-makers, for securing two sums of £1500 and £2400. The assignment recited the pendency of the suit and the Vice-Chancellor's decree, and contained a power of sale in default of payment.

Under the receivership directed by the decree a sum of £7390 was paid into Court, and on the 14th of October, 1865, an agreement for compromising the suits was signed, by which it was agreed that the accounts should be completed on the footing of equal partnership between *Beeton* and *Hutton* the elder, and that £3000 of the fund in Court should be at once paid to *Beeton*, and the rest to *Hutton* the elder. This agreement was afterwards modified, and it

was arranged that *McMurray* should pay £3000 to *Beeton*, and that the whole of the fund in Court should be paid to *Hutton* the elder.

On the 20th of November, 1865, the registration was completed at the Inland Revenue Office, *Beeton* and *Hutton* the elder being registered as the proprietors of the newspaper in equal moieties, subject to mortgages thereof to *McMurray*.

On the 9th of March, 1866, two further agreements were signed, one between *Hutton* the elder, *Beeton*, and *McMurray*, and the other between *Hutton* the elder and *Beeton*, respecting the sums due to the partners respectively on taking the partnership accounts; and by a mortgage deed of the same date, made between *Beeton* of the one part, and *Hutton* the elder of the other part, *Beeton* acknowledged that after receiving the £3000 before mentioned he had been overpaid £2000 as between himself and *Hutton* the elder, and that he also owed *Hutton* the elder £512 as the balance of the purchase-money for his moiety of the newspaper, and *Beeton* thereby mortgaged his share in the property to *Hutton* the elder for securing the payment of the two sums of £2000 and £512, with interest at 7½ per cent.

On the same 9th of March, 1866, a minute was registered at the Inland Revenue Office of *Dorling* being the publisher, and *Hutton* the elder and *Beeton* being the proprietors, of the newspaper, subject as to *Hutton's* share to a mortgage to *McMurray*, and as to *Beeton's* share to a mortgage to *Hutton* the elder.

No notice of the mortgage was given to *Wrigley & Son;* but on the 13th of March, when the petition for the payment of the fund in Court to *Hutton* the elder was about to come on, *Wrigley & Son* ascertained the facts of the case, and they ultimately assented to the fund being paid to *Hutton* the elder on condition of *Beeton* handing over to them the £3000 paid to him by *McMurray*.

On the other hand, the evidence was conflicting of any notice having been given to *Hutton* the elder or *McMurray* of the previous mortgage to *Wrigley & Son*. *Wrigley & Son* did not register their mortgage at the Inland Revenue Office, but on the 24th of March, 1866, they entered it at *Stationers' Hall* under the notion of their title to the newspaper being a matter of copyright. *Beeton* made default in the payment of the mortgage debt secured to

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Wrigley & Son, and on the 16th of August, 1866, they sold all *Beeton's* interest in the newspaper, under their power of sale, to the Plaintiff *Kelly* for £2000, and by a deed of that date assigned it to him. The Plaintiff shortly afterwards gave notice of his purchase to *Hutton* the elder and *Dorling*.

On the 17th of August, 1866, *Beeton* executed a deed of composition with his creditors, and assigned all his property to trustees for them.

On the 13th of September, 1866, *Hutton* the elder signed an agreement of that date, whereby he professed to sell all *Beeton's* interest in the newspaper and premises under the power of sale contained in *Beeton's* mortgage of the 9th of March, 1866, to his son, *John Hutton* the younger, for £7000, the amount due to remain a burden on the property.

On the 30th of September an entry was made at the Inland Revenue Office that *Hutton* the elder and his son were the proprietors of the newspaper, subject to two mortgages to *McMurray*.

On the 27th of April, 1867, *McMurray* purchased from *Beeton's* trustees all their interest in the equity of redemption of his share.

On the 30th of October, 1866, the Plaintiff filed his bill, which was afterwards amended, and thereby asked to set aside the sale to *J. Hutton* the younger, to have it declared that *Hutton* the elder and *McMurray* had no mortgage nor lien on the one-half of the newspaper mortgaged to *Wrigley & Son*, and that the Plaintiff was absolutely entitled to such share free from incumbrances; but, in the alternative, asking to redeem *Hutton* the elder and *McMurray*.

On the 8th of February the Vice-Chancellor made a decree declaring that the mortgage to *Hutton* the elder of the 9th of March, 1866, and the sale by *Hutton* the elder to his son were invalid, so far as they affected the title of the Plaintiff to one-half share of the newspaper, and ordered them to be set aside accordingly. And it was further declared that the Plaintiff was absolutely entitled to one-half of the said newspaper, and the copyright thereof, discharged from the mortgage of the 9th of March, 1866; it was ordered that the accounts of the newspaper should be taken from the 16th of August 1866, the date of the sale, and the clear net profits from that date ascertained, and it was declared that the Plaintiff was entitled to one-half of such clear profits. It

was also ordered that the Defendants should procure a registration of the paper in moieties, and that certain parts of the costs should be paid by the Defendants. From this decree the Defendants appealed.

Sir *Roundell Palmer*, Q.C., and Mr. *Fry*, for the Appellants:—

There is no copyright in a newspaper, and the registration at *Stationers' Hall* was simply nugatory. The name of a newspaper is similar to a good-will or trade-mark, and no legal assignment of it can be made by one of the partners. The utmost right which such an attempted assignment could convey would be a right to some compensation for the use of the name, to be paid out of the assignor's share of the profits. This can only be subject to all the equities which exist between the copartners. *Wrigley & Son* had notice of the disputes between *Beeton* and his partner, and, on the other hand, *Hutton* the elder had no notice of *Wrigley & Son's* mortgage. Nor was there any entry of it on the register of the Inland Revenue Office.

[They cited the statutes 6 & 7 Will. 4, c. 76, s. 6, and 5 & 6 Vict. c. 45, ss. 2, 13, 18, and the following authorities: *Bray* v. *Fromont* (1); *Brown* v. *De Tastet* (2); *Longman* v. *Tripp* (3); *Ex parte Foss* (4); *Harmer* v. *Westmacott* (5); *Maxwell* v. *Hogg* (6); *Bradbury* v. *Dickens* (7); *Platt* v. *Walter* (8); *Hancock* v. *Bewley* (9); *Mathers* v. *Green* (10); *Dent* v. *Turpin* (11); *Loveridge* v. *Cooper* (12); *Martin* v. *Sedgwick* (13); *Robertson* v. *Quiddington* (14); *Collyer* on Partnership (15).]

Mr. *W. M. James*, Q.C., Mr. *Pearson*, Q.C., and Mr. *A. G. Langley*, for the Plaintiff:—

The name of a newspaper is a chattel interest capable of assignment: *Longman* v. *Tripp*; *Ex parte Foss*. We admit that the assignment to *Wrigley & Son* was subject to the ordinary partner-

(1) 6 Madd. 5.
(2) Jac. 284.
(3) 2 Bos. & P. (N. R.) 67.
(4) 2 De G. & J. 230.
(5) 6 Sim. 284.
(6) Law Rep. 2 Ch. 307.
(7) 27 Beav. 53.
(8) 17 L. J. (Ch.) 157.
(9) Joh. 601.
(10) Law Rep. 1 Ch. 29.
(11) 2 J. & H. 139.
(12) 3 Russ. 1, 30.
(13) 9 Beav. 333.
(14) 28 Ibid. 529.
(15) Page 127.

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ship accounts, but not to the transactions between *Beeton* and *Hutton* the elder in March, 1866. Our assignment was previous to those transactions, and also to the decree of the Lords Justices of August, 1864. The evidence shows that *Hutton* the elder, at the date of the mortgage under which he claims, had notice of our assignment.

Sir *Roundell Palmer*, in reply.

July 30. On this day the judgment of the Court was delivered by SIR W. PAGE WOOD, L.J. His Lordship, after stating fully the facts of the case, continued:—

Many points have been raised before us as regards the property which was the subject of the mortgage to *Wrigley & Son* of the 21st April, 1864. It appears to us that *Beeton* and *Hutton* the elder were engaged in a joint adventure, namely, the publishing of the paper in question. Capital was required for this adventure, and the co-partners, or co-adventurers, possessed leasehold premises and type, and other chattels necessary for carrying it on. The mortgage to *Wrigley & Son* assigned to them *Beeton's* share in the newspaper whatever it might be, and all profits belonging thereto, or arising therefrom. In the *habendum* the deed speaks of the copyright of the newspaper, and the right of continuation and publication thereof.

Now it appears to us that there is nothing analogous to copyright in the name of a newspaper, but that the proprietor has a right to prevent any other person from adopting the same name for any other similar publication; and that this right is a chattel interest capable of assignment was held in *Longman* v. *Tripp* (1), and *Ex parte Foss* (2). The mortgage, then, to *Wrigley & Son*, was that of *Beeton's* share of a chattel which formed the principal subject of the co-adventure between *Beeton* and *Hutton* the elder. Considerable stress has been laid in argument, on the part of the Appellants, on the necessity of notice being given of such an assignment, either by direct notice to *Hutton* the elder, or by an entry at

(1) 2 Bos. & P. (N. R.) 67. (2) 2 De G. & J. 230.

the Inland Revenue Office, and much controversy has arisen in evidence as to whether *Hutton* the elder had or had not, in fact, such notice prior to the 9th of March, 1866. The entry of their mortgage by *Wrigley & Son* at *Stationers' Hall* was clearly futile; but we do not pause to consider the question further, because it is clear on the face of their mortgage deed that *Wrigley & Son* were aware of the litigation between *Beeton* and *Hutton* the elder. They allowed the joint adventure to be worked jointly, whether with or without notice, and it is impossible that they can now take to themselves the subject of that adventure and the profits arising therefrom without being subject to every equity of the co-adventurer. A judgment creditor in execution against one partner his debtor, takes only the interest of the debtor subject to his co-partner's equities, and *Wrigley & Son* could not claim the asset without satisfying, in the first place, the lien of £512 for the unpaid purchase-money of *Beeton's* moiety, nor without satisfying the balance of account due from *Beeton* to his co-adventurer, *Hutton* the elder.

The lien of *Hutton* the elder, as *quasi*-partner in the adventure, must be satisfied before the subject matter of the adventure can be passed over to any person claiming under an assignment from *Beeton*. And this lien must continue so long as *Wrigley & Son*, as the assigns of *Beeton* by way of mortgage, allow the business to be carried on in co-partnership by *Beeton* and *Hutton* the elder. Irrespective of the doctrine of notice they cannot take the benefit of *Hutton's* capital in carrying on the concern (whether they have given him notice or not), and then ask to have the share of *Beeton* in the chattel, and still less in the profits of the concern, handed over to them without first satisfying the lien of his co-adventurer for what may be due to him on taking the accounts of the adventure. The same reasoning applies to the Plaintiff as purchaser. His letter of the 27th of December, 1866, to *Hutton* the elder, set out in the amended bill, shews that he, at least up to that time, acquiesced in the arrangement under which the newspaper was to be carried on:—[His Lordship read the letter.] In fact, having acquired the interest of *Beeton* in the newspaper, his mortgagees allow *Beeton* to conduct the business, and he must be taken to act as their agent and on their behalf. They do not advance any capital, and ask no

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question as to how it is to be provided. They must, therefore, take the business as they found it, at least up to the time of the actual exclusion of the Plaintiff by *Hutton* the elder from the concern, and even after that time profits cannot be claimed without making all just allowances in respect of such moiety.

Hutton the elder therefore, wholly irrespective of his mortgage of the 9th of October, 1866, would be entitled to a lien on *Beeton's* share in the newspaper for £512, the unpaid purchase-money. He would also, we think, be entitled to the balance on the account settled on the 9th of March, 1866, with *Beeton* (which account came down to the 30th of September, 1865), and to the £2000 due to *Hutton* the elder as the result of that account, and the arrangement consequent on it. We think, also, that interest at the rate of 7½ per cent. per annum must be allowed on those two sums, for *Hutton* the elder was clearly entitled to decline carrying on the business, whether with or without the knowledge of *Wrigley & Son's* mortgage, except on the terms of being allowed interest on his capital. It is, in fact, advanced to the Plaintiff. As regards *Hutton* the elder's alleged sale to *Hutton* the younger on the 13th of September, 1866, we are of opinion that no such sale has been proved, certainly none that can be upheld against the Plaintiff.

As to the whole case, therefore, we conclude that the Plaintiff has become entitled to the interest of *Beeton* in the newspaper. We see no reason why that interest should not be dealt with, as on former occasions, by directing the Defendants to concur in procuring the Plaintiff's name to be registered at the office of Inland Revenue as such owner, subject to the lien before mentioned.

Solicitors for the Plaintiff: Messrs. *Pritchard & Collette.*
Solicitors for the Defendants: Messrs. *Bevan & Whitting.*

BRADFORD *v.* BROWNJOHN.

L. JJ.
1868
July 3, 4, 11.

Tenant for Life and Remainderman—Renewal of Leaseholds—Apportionment of Expenses of Renewal.

A tenant for life of leaseholds for years determinable on lives, obtained, before his estate for life had come into possession, the grant of a reversionary term determinable on a new life, and to commence after the determination of the old term. He came into possession, and afterwards died, having possessed the estate during part of the term created by the new grant:—

Held (varying the decision of *Stuart*, V.C.), that the amount to be paid by the remainderman in respect of the fine and expenses of renewal was to be ascertained by reference to the actual enjoyment of the tenant for life, and compound interest to be computed on the proportion attributable to the remainderman up to the death of the tenant for life, and simple interest from that time until payment.

THIS was an appeal from a decision of Vice-Chancellor *Stuart* on a special case.

The testator, *Thomas Allen*, was, at the date of his will, entitled to two copyhold farms held for the lives of himself and his sons, *Thomas Allen* and *Joseph Allen*, and the survivors and survivor of them. He was also entitled to a certain leasehold for a long term, determinable on the death of the survivor of himself and his said sons, and also to another leasehold for a term, determinable on the death of the survivor of *William Hollins* and *James Cowderoy*.

The testator, by his will, gave his copyholds and leaseholds to his widow for life, with remainder to the above-named *William Hollins* for life, with remainder to the children of *William Hollins*, and in the event of there being none, to *Joseph Allen* absolutely. The will contained no directions as to renewals.

In 1828, after the death of the testator, but in the lifetime of the widow, *Thomas Allen* being dead, but *Joseph Allen* living, *William Hollins* obtained reversionary grants of the copyholds for the lives of himself and *Francis Gale* and the survivor. He also obtained a reversionary lease of the first-mentioned leasehold farm for a term determinable on the death of the survivor of himself and *Francis Gale*. In the same year, *James Cowderoy* being alive,

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William Hollins obtained a reversionary lease of the secondly-mentioned leasehold for a term determinable on the death of *Francis Gale.*

Joseph Allen died in 1830, and the testator's widow in 1832. *William Hollins* died a bachelor in 1865, whereupon the gift over in the will in favour of *Joseph Allen* took effect. *Francis Gale* was still living.

The Plaintiff in this case claimed under *Joseph Allen.* The Defendants were the personal representatives of *William Hollins,* and the question was upon what principle the amount to be repaid to the estate of *William Hollins* in respect of what he had paid for fines on the renewals ought to be ascertained? It had been agreed between the parties that a value should be set upon the life of *Francis Gale,* as upon the day of the death of *William Hollins,* for the purposes of the calculation.

The Vice-Chancellor held that the amount of the sums paid for renewal ought to be apportioned between the tenant for life and remainderman with reference to the actual enjoyment of the property by *William Hollins,* and that the Plaintiff must pay his share with simple interest from the death of *William Hollins.* The Defendants appealed, contending that compound interest ought to be computed from the time of the payment by *William Hollins* up to his death. (See 3 H. & M. 629)

Mr. *Greene,* Q.C., and Mr. *Fischer,* for the Appellants, referred to *Nightingale* v. *Lawson* (1); *White* v. *White* (2); *Giddings* v. *Giddings* (3).

Mr. *Karslake,* Q.C., and Mr. *F. H. Colt,* for the Plaintiff, referred to *Hudleston* v. *Whelpdale* (4); *Jones* v. *Jones* (5); *Reeves* v. *Creswick* (6); *Harris* v. *Harris* (No. 3) (7); *Verney* v. *Verney* (8); *Rawe* v. *Chichester* (9); *Stone* v. *Theed* (10); *Carter* v. *Sebright* (11); *Ainslie* v. *Harcourt* (12).

(1) 1 Bro. C. C. 440.
(2) 9 Ves. 554, 557.
(3) 3 Russ. 241, 260.
(4) 9 Hare, 775.
(5) 5 Ibid. 440.
(6) 3 Y. & C. Ex. 715.
(7) 32 Beav. 333.
(8) Amb. 88.
(9) Ibid. 715.
(10) 2 Bro. C. C. 243.
(11) 26 Beav. 374. 5 Jur. N. S.
(12) 28 Ibid. 313.

SIR W. PAGE WOOD, L.J.:—

The question in this case is, how the price paid by the tenant for life for the renewal of leases for lives is to be distributed, the tenant for life not having survived during the whole of the new lives that were introduced.

I thought that the principle had been settled long ago by *Nightingale* v. *Lawson* (1), and that in the subsequent cases there had been no departure from it. Upon carefully reading Lord *Eldon's* judgment in *White* v. *White* (2), it is impossible to say that he could have been deceived as to the effect of *Nightingale* v. *Lawson*, although it is not well reported, for he says that to the best of his recollection Lord *Kenyon* assisted Lord *Thurlow* in making the decree, and that it had stood for twenty years. We may now say it has stood for half a century, and it has never been disputed, but on the contrary it has been followed in *Giddings* v. *Giddings* (3).

The principle upon which these authorities proceed is clear enough, although the matter is one difficult to adjudicate upon with perfect nicety and justice, and there may be some degree of rudeness in the rule that has been laid down. The rule before Lord *Thurlow's* time was, that the tenant for life should pay one-third, and the remaindermen two-thirds of the fines. That would work justice in no way whatever. But Lord *Thurlow's* principle is simple and intelligible, though it may not always work out complete justice. To shew the principle on which the amount of a fine is ascertained, take the case of a lease for forty years, of which twenty years have expired, and you wish to make it still forty years; that is, you are about to buy a lease for twenty years in reversion, and to pay for it twenty years before it falls into possession. The mode in which the lessors compute the fine is this. They say what is the value of this lease as a lease for twenty years in possession? Having ascertained that they say—inasmuch as it will not fall into possession for twenty years, you cannot pay the value down as if you were going to take possession immediately; what you must pay down is a sum of money which invested and accumulated for twenty years, will at the end of that time amount to the value of the lease in possession. Then, in considering what

(1) 1 Bro. C. C. 440. (2) 9 Ves. 557.
(3) 3 Russ. 241, 260.

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the remainderman ought to pay on the death of a tenant for life when the renewal has been effected by the tenant for life, first take the simple case where the tenant for life happens to die at the end of the original forty years and before the reversionary twenty years comes into possession. In that case the tenant for life has bought, solely for the benefit of those who come after him, a twenty years' lease in possession. They, finding a twenty years' lease in possession, ought to pay for it according to its value. What is that value? The amount of the sum paid down twenty years ago with compound interest. After the death of the tenant for life simple interest only is computed, the right to possession of the estate on payment of an ascertained sum having accrued at the death of the tenant for life. The whole of this branch of law has arisen from the fact that where a leasehold for lives or years is renewed by a person having a limited interest in it, the Court will not allow him to retain the benefit of the renewal for himself exclusively, but holds him to have obtained it as a trustee, and the remaindermen cannot take the estate from the trustee without reimbursing him.

In *Jones* v. *Jones* (1), Vice-Chancellor *Wigram* very carefully lays down the different cases that may happen. There may happen a case of the testator declaring the expense of renewals to be a charge upon the estate. But when there is no such direction and you treat a person as your trustee, and take from him what he has bought for you, you must pay him for what he has bought. Take the above simple case of a reversionary term of twenty years, and suppose the tenant for life lives nineteen of those twenty years, there being only one year left the remainderman will have to pay what is to be appropriated for that one year.

Then as to the case of renewals for lives instead of years, Vice-Chancellor *Wigram* in *Jones* v. *Jones*, begins his judgment by saying that he thinks it settled upon the authorities that there is no difference in principle between that case and that of renewals for years. There is simply the difficulty of arriving at the value. You must assume values for lives according to the tables framed for this purpose, and then the principle applies exactly in the same way. In this particular case the parties have agreed that

(1) 5 Hare, 440.

the surviving life shall be taken to be of the value it is at the present time. That does not alter the principle at all. It only comes to this, that the life was an ordinary life, and that therefore it is just as well to take it at its present value as to go back to its former value and make a calculation from the time when the money was paid down.

The answer then to the case must simply be, following *Nightingale* v. *Lawson* (1), that the amount to be paid by the Plaintiff for and in respect of the fines and expenses should be ascertained by reference to the actual enjoyment by *William Hollins*, and to the value to be set upon the life of *Francis Gale* at the death of *William Hollins*, having regard to the agreement to have a value set upon the life of *Francis Gale* at the death of *William Hollins*, and then compound interest should be computed, during the life of *William Hollins*, at the rate of 4 per cent. per annum with annual rests on the proportion payable by the Plaintiff, and simple interest at 4 per cent. should be computed for what shall be found due at the death of *William Hollins* for principal and interest as aforesaid till payment to the Defendants.

SIR C. J. SELWYN, L.J.:—

One point which was strongly urged upon us was, that the tenant for life ought, at all events, to have been decreed to keep down during his life the interest on the money borrowed for renewal, and many cases have been cited in support of this contention. Those cases consist principally of three classes: first, where a provision has been made by the testator or settlor for the expense of renewal by sale or mortgage of the estate itself, in which case the tenant for life loses the rents of the part sold in the case of a sale, and keeps down the interest in the case of a mortgage; secondly, where the same provision is made by means of the sale or mortgage of another estate, in which case the tenant for life of that estate is in a similar position, and the case of *Ainslie* v. *Harcourt* (2) affords an instance of both these classes. The third class of cases is where the expenses of renewal are directed to be paid out of the rents and profits, in which case the whole burthen is thus thrown upon the tenant for life, as in the case of *Solley* v. *Wood* (3). But where, as

(1) 1 Bro. C. C. 440. (2) 28 Beav. 313. (3) 29 Beav. 482.

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here, there is no provision made by the testator, it is clearly settled that the expense is to be borne by the parties interested, in proportion to their enjoyment. At the time of the renewal the tenant for life, in effect, purchases an estate in possession, and the remainderman an estate in remainder, and if at that time they could foresee exactly the sums which certainly would have to be paid, and if it was then ascertained that out of a sum of £2000 required for that purpose, £1800 was to be paid by the tenant for life, and £200 by the remainderman, no interest would become due by or to any person. So if neither of them had the means of paying his share except by borrowing, and both had accordingly borrowed from a third person, each of them would have to pay interest on the sum so borrowed by him. But, in the present case, instead of borrowing from a third person, the tenant for life has paid the whole, and when the remainderman comes to claim the benefit of that renewal, upon what principle can he claim to be in a better position with respect to interest than if he had paid his share, that is to say, £200, out of his own pocket or borrowed it from a third person. If he accepts the estate it is clear that the £200 was paid for his benefit at the time it was paid, and consequently must bear interest as against him from that time, and the authorities are decisive upon the point that interest is to be calculated with annual rests upon the same principle as interest is calculated upon reversionary estates or interests. That calculation is made up to the time when the reversion falls into possession, that is, up to the day of the death of the tenant for life, and from that time the remainderman, if he accepts the estate subject to the burthen of paying his share of the expense of the renewal, becomes entitled, like an ordinary purchaser, to the rents and profits as from that day, and becomes subject to the ordinary rate of interest from the same time; and this is, I apprehend, the meaning of Lord *Thurlow's* observations in *Nightingale* v. *Lawson* (1), where he says, after the death of the tenant for life the demand upon the remainderman becomes a common debt. I think, therefore, that the order in this case must be in the form the Lord Justice has mentioned.

Solicitors: Messrs. *Grane, Son, & Fesenmeyer*; Mr. *C. P. Titt.*

(1) 1 Bro. C. C. 440.

FRANKS *v.* BOLLANS.

L. JJ.
1868
June 23.

Married Woman—Fines and Recoveries Act—3 & 4 Will. 4, c. 74—Proceeds of Sale of Real Estate.

Land was held by the trustee of a will upon trust for sale and for immediate division of the proceeds among the testator's children, two of whom were married women. By a deed, in which the *cestuis que trust* joined, the trustee became the purchaser of the estate at the price therein named. The two married women and their husbands concurred in the deed, but it was not acknowledged under the *Fines and Recoveries Act*. The husbands received their wives' shares of the purchase-money:—

Held (affirming the decision of *Stuart*, V.C.), that the deed was inoperative as against one of the daughters who had survived her husband.

Confirmed 13 Eq 301,

THIS was an appeal from a decision of Vice-Chancellor *Stuart*.

John Bollans, by will made in 1839, devised certain real estate to his son, the Defendant *William Bollans*, and another person since deceased, in trust for the testator's wife for life, and after her decease upon trust to sell the property and divide the net proceeds among all the testator's children who should be living at his death. The testator died in 1839, leaving five children, of whom the Plaintiff, Mrs. *Franks*, was one. The widow died in 1841. On the 21st of November, 1842, a deed was executed of a somewhat singular character, into the particulars of which it is unnecessary to enter, it being sufficient for the purpose of the present report to say that it was a deed by which the Defendant *Bollans* became the purchaser of a part of the above estate, at a certain price, by arrangement with the *cestuis que trust*. Mrs. *Franks* and her husband, and another daughter of the testator with her husband, were parties to and executed the deed, but it was not acknowledged by either of them under the *Fines and Recoveries Act*. Mr. *Franks* received his wife's share of the purchase-money named in the deed.

Mrs. *Franks* having become a widow, filed her bill to carry into execution the trusts of her father's will, and to have the deed of November, 1842, declared invalid as against her. Vice-Chancellor *Stuart* made a decree as prayed, from which the Defendant *Bollans* appealed. (2 H & M 284)

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Mr. *Bacon*, Q.C., and Mr. *Wickens*, for the Appellant:—

The estate in 1842 was subject to an absolute immediate trust for sale, and the proceeds were immediately divisible. The shares of the married women, therefore, were personal estate, payable *in præsenti*, and the husbands could give good discharges for them. There is no substantial difference between this case and *Rees* v. *Keith* (1). In *Briggs* v. *Chamberlain* (2) it was decided that an interest in the moneys to arise from the sale of real estate was so far an interest in land that an acknowledged deed would pass it; but did not decide that it was not so far personalty as to enable the husband to give a valid receipt for it, or release of it, when presently payable, as he could in the case of money due on mortgage.

Mr. *Greene*, Q.C., and Mr. *Torriano*, for the Plaintiff, were not called upon.

SIR W. PAGE WOOD, L.J.:—

The argument for the Appellants involves the manifest fallacy of confounding an interest in land with a mere charge on land. The Plaintiff was entitled to a share in the proceeds of land directed to be sold. If the land had been sold, the proceeds would have been money to all intents and purposes, and the husband could have given a good discharge for Mrs. *Franks'* share of them. Until the land is sold, this Court, for many purposes, treats it as money; but no authority has been cited, and I should have been surprised if any authority could have been cited, to shew that the husband could, by any act of his before the sale, bar his wife's right to her share of it. A share in the moneys to arise from the sale of an estate is, in many of its incidents, quite different from a sum of money charged upon the estate.

The Defendant being a trustee for sale, could not acquire the beneficial ownership of the property except by a gift or sale from the *cestuis que trust;* he was under an absolute disability to acquire it otherwise. He is a trustee of it still, for the Plaintiff never disposed of her interest to him. She put her name to a piece of parchment, but not so as in any way to bind herself. I do not

(1) 11 Sim. 388. (2) 11 Hare, 69.

enter into any of the other circumstances of the case; but, on the ground that the estate has never changed hands, I am of opinion that the appeal must be dismissed with costs.

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SIR C. J. SELWYN, L.J.:—

The Appellant's argument has been rested on an analogy to the power of a husband to receive mortgage money due to his wife. But here the money was to arise from the sale of land, and the husband's right to receive it was not capable of being exercised until the money had arisen by a sale. How can we say that there has been a sale here? The trustee could not sell to himself. To every sale there must be two parties, and they must both be competent to contract. Here two of the *cestuis que trust* were under the disability of coverture, which, in the absence of acknowledgment by them, makes their concurrence in the sale nugatory. I agree that the appeal ought to be dismissed with costs.

Solicitors: Mr. *W. Pitman;* Messrs. *Paterson, Snow, & Burney.*

CARROW *v.* FERRIOR.
DUNN *v.* FERRIOR.

L. JJ. 1868 *April* 30; *May* 7.

Receiver—Adverse Legal Titles—Alleged Vacant Possession—Breach of Interim Order.

A lunatic seised of real estate died intestate, and it had not been found who was her heir-at-law. *F.*, *C.*, and *D.*, respectively claimed the property as heirs. After the death of the lunatic, the gentleman who had acted as the solicitor of the committee, introduced *F.* to some of the tenants as being the heir, but the committee took no part in this. *C.* and *D.* severally filed bills against *F.* for the appointment of a receiver. *C.* moved for a receiver; and on the 21st of November, 1867, *Malins*, V.C., ordered the application to stand over for *C.* to make an application in Lunacy, and granted an interim order to restrain *F.* from receiving the rents. On the 20th of December the application in Lunacy was refused; and on the same day *C.* moved before the Vice-Chancellor to extend the interim order till the motion should be disposed of before His Honour; and the order was extended accordingly, but *F.* had no notice of this. *F.* accordingly received rents at Christmas. The motion was heard on the 13th of February, 1868, and an order made by the

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Vice-Chancellor for a receiver, and for *F.* to pay into the hands of stakeholders the rents which he had received :—

Held, on appeal, that the order for payment of the rents to stakeholders ought not to be disturbed, an interim order as a general rule remaining in force until the case is disposed of :

But, *held*, that the order for a receiver could not be sustained, the case being merely one where several persons set up adverse legal titles to the property :

Held, that no equity was raised by the circumstance that the person who had been solicitor to the committee was acting as *F.'s* solicitor, and had induced the tenants to attorn to him, nor by the circumstance that some of the tenants had been induced to attorn by *F.'s* granting them leases on very favourable terms.

Semble, that a receiver of real estate will not in general be granted as between adverse legal claimants, even though the possession be vacant.

Observations on *Mordaunt* v. *Hooper* (1) and *In re Butler* (2).

THIS was a motion to discharge an order of Vice-Chancellor *Malins* for the appointment of a receiver of the real estate of *Mary Ferrior* deceased, and an order for payment of certain rents into the hands of stakeholders.

On the 9th of September, 1836, *Mary Ferrior* was found a lunatic. *Robert Ferrior* was found in the lunacy to be her heir-at-law. In 1849 he died. In June, 1866, advertisements were issued for the heir-at-law of the lunatic. Claims were sent in by various persons, including *Carrow*, *Dunn*, and *Ferrior ;* but before any report had been made, *Mary Ferrior* died on the 7th of April, 1867, intestate and unmarried. *Carrow* filed his bill, alleging the existence of outstanding terms, and praying for a receiver of the real estate till the question of heirship should be determined, making *Ferrior* a Defendant ; and on the 21st of November, 1867, moved for a receiver before Vice-Chancellor *Malins*. The committee deposed that he had not communicated with any of the tenants as to the claims of *Ferrior*, or of any other person, to be heir-at-law. It appeared, however, that Mr. *Mathias*, who had for some years acted as solicitor of the committee, had, after the lunatic's death, introduced *Ferrior* to some of the tenants as their future landlord, and informed them that he was the heir-at-law. *Ferrior* had not, however, received any rent, nor obtained actual possession of any part of the property. The Vice-Chancellor

(1) Amb. 311. (2) Law Rep. 1 Ch. 607.

directed the application to stand over for *Carrow* to present a Petition in the lunacy, and His Honour continued an interim order which had been made in the Vacation to restrain *Ferrior* from receiving the rents. *Carrow* immediately presented a Petition in the lunacy, praying that the committee might be restrained from giving up possession of the estate till the question of heirship was determined, and might continue to receive the rents in the mean-time.

Dunn subsequently filed his bill for similar relief, and moved for a receiver. The two motions, and the Petition in the lunacy, came on before the Lord Justice *Rolt* on the 20th of December, 1867, when his Lordship declined to deal with the motions, leaving them to be dealt with by the Vice-Chancellor, and made no further order on the Petition than an order as to the custody of the title deeds of the estates, being of opinion that he had no jurisdiction in Lunacy to make any further order (1). On the same day counsel applied *ex parte* on behalf of *Carrow* to Vice-Chancellor *Malins*, and obtained an order extending the interim injunction till the first day of Hilary Term, but this order was never drawn up. On the same day *Mathias* went round with *Ferrior* to the tenants, and introduced him as the heir. Several of the tenants accepted leases from *Ferrior* on terms very favourable to themselves. At Christmas *Ferrior* received rent from some of them. *Carrow* moved to commit *Mathias* and *Ferrior* for a breach of the injunction, and *Dunn* made an application for committal, and for *Ferrior* to pay into Court the rents he had received, and to give up possession. The Vice-Chancellor refused the application for committal, on the ground that the application on the 20th of December for extending the interim injunction was an admission of its being at least doubtful whether the interim order had not dropped, and that it was not shewn that there was any notice of the *ex parte* order for its extension made on that day, the mere fact of the presence of *Ferrior's* leading counsel in Court when the order was made not affecting the client with notice, the counsel having received no instructions. His Honour expressed disapprobation of *Mathias's* proceedings, but considered that he could not make any order on the motion, either by committal, or by ordering

(1) Law Rep. 3 Ch. 175.

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payment of costs. His Honour, however, ordered *Ferrior* to pay the rents which he had received into a bank, to the joint account of two of the solicitors in the cause.

On the 13th of February the motion for a receiver was renewed, and Vice-Chancellor *Malins* made an order for the appointment of a receiver (1).

(1) SIR R. MALINS, V.C. :—

I do not think it necessary to hear a reply. The facts of this case are of the simplest description. The lunatic, Mrs. *Mary Ferrior*, succeeded to this estate as heiress in 1863. She had been found a lunatic in 1836, and therefore never had any opportunity of exercising any control over the property. Proceedings in Lunacy had been taken to ascertain the heir, and the person who had been found heir having died, it became necessary again to ascertain who was the heir. Before any conclusion could be arrived at as to the fact of the heirship, several persons (no less I believe than eight) having taken in claims, the lunatic died in April last intestate. It was, therefore, at the time of her death, perfectly uncertain who was her heir-at-law, and thus the very case occurred which Lord *Eldon*, in *Ex parte Clarke* (Jac. 592), said he had never known to occur—a case of disputed heirship at the death of the lunatic; and the question is, what can be done under the circumstances? Now there are certain principles clearly settled. If there had been a finding of the heir in the lifetime of the lunatic, it would (as stated by Lord *Eldon* frequently, by Lord *Redesdale* in *In re Fitzgerald*, and recently by the Lord Justice *Turner*), have been the duty of the committee to deliver up possession of the estate to the person so found heir, though such a finding does not decide anything, but only shews a *primâ facie* title, and does not prejudice the right of any one who can shew a better title to recover in ejectment. In the present case, so far as appears before me, the claimants have, from eight or nine, dropped down to three, all of whom are before the Court—Mr. *Carrow*, Mr. *Ferrior*, and Mr. *Dunn*. Two of these, Mr. *Ferrior* and Mr. *Dunn*, claim to be heirs on the paternal side; Mr. *Carrow* claims on the maternal side, and therefore his counsel admitted that if Mr. *Dunn* or Mr. *Ferrior* can prove themselves to be of the blood of the intestate on the paternal side there will be an end of Mr. *Carrow's* claim. If they fail to prove their pedigree, the paternal pedigree being exhausted, Mr. *Carrow* may come in as maternal heir. Now with regard to Mr. *Dunn* and Mr. *Ferrior*, they have not at present proved anything, not even that they are of the blood of the intestate. With regard to Mr. *Carrow*, he is, in a certain degree, in a better position than the other two claimants, because his father proved himself, to the satisfaction of a competent tribunal, to be of the next of kin, that is, of the blood of the intestate; and a person who is next of kin, although not necessarily heir, must be capable of being the heir if there is no nearer relative to be found. Therefore I consider it established that Mr. *Carrow* is of the blood of the intestate, and capable of being heir. Now, the lunatic having died in April, no rents became payable until after Mr. *Carrow's* bill was filed. That bill was filed on the 10th of September last, and an *ex parte* application was made to me in the Long Vacation to prevent Mr. *Ferrior* from receiving any

Mr. *Osborne*, Q.C., and Mr. *Bevir*, for the appeal motion:—

There is no jurisdiction to appoint a receiver: *Jones* v. *Jones* (1), *Talbot* v. *Hope Scott* (2). The only similar case in which a receiver has been granted is *Mordaunt* v. *Hooper* (3), where the circum-

of the rents. In that suit Mr. *Carrow* was Plaintiff, and Mr. *Ferrior* the sole Defendant. Upon reading the papers and affidavits I thought it was a proper case for interim protection, and I therefore granted an interim order until Michaelmas Term, giving leave to serve notice of motion for the first or second day of Michaelmas Term. That motion was renewed before me in November. The matter has been pending before me ever since then, and, finally, now has come on for argument. On one side it is insisted that the principle of this Court is in all cases to protect property pending litigation, and on the other side that proposition is disputed. Mr. *Carrow*, the maternal heir, as he states himself to be, and Mr. *Dunn*, who claims to be paternal heir, both move for the appointment of a receiver. That is opposed by Mr. *Ferrior*, who claims, as he says, under a common ancestor, who is not shewn to have been alive since 1693. I assume that any one of these gentlemen may ultimately prove his title, and I must assume that this litigation may have some considerable duration. Now if a receiver is not appointed it is quite clear that if any one of these gentlemen can get into possession of this estate he will thereby gain a considerable advantage over his adversary, because, being in possession of the estate, he puts his adversary to bring an ejectment, where the rule is, that you recover not on the weakness of the title of the person in possession, but on the strength of your own title, or, in other words, the Plaintiff in ejectment must, in order to recover, shew a better title to the estate than the man who is at the time in possession. That seems to have been thought so great an advantage by Mr. *Mathias*, the solicitor of Mr. *Ferrior*, that every effort has been made by him to put his client into that situation. I stated upon the motion to commit that I was not pleased with his conduct, he having been the solicitor of the committee. It is laid down in all the cases that it is the duty of the committee, who is an officer of the Court, to hold an even hand between the parties, and not to become a partisan of either party. The committee here was a clergyman, and I cannot avoid coming to the conclusion that the management of the estate being in the hands of Mr. *Mathias*, the same duty as was imposed upon the committee was imposed upon him, and he ought to have been extremely cautious in giving the weight of his authority by representing to the tenants that any one of these claimants had a preferable title to another. The evidence is, that knowing perfectly well that Mr. *Ferrior* claimed under a pedigree from a common ancestor, who was not known to have been alive within the last 175 years, he very shortly after the death of the lunatic walks round the estate with Mr. *Ferrior*, and says to the tenants, "This is Captain *Ferrior*, who will become your landlord." Mr. *Mathias* being a gentleman of high respectability and of great influence in the neighbourhood, it is not to be wondered at that he should have been considered as being incapable of error when he said that Captain *Ferrior* was the heir. The

(1) 3 Mer. 161. (2) 4 K. & J. 96. (3) Amb. 311.

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stances were peculiar, and there was great danger of the rents being lost. The Court does not interfere in a mere legal dispute. Possession here is not vacant, except in so far as the *ex parte* order

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tenants would naturally believe his representations and would be willing to attorn to and pay rent to his nominee. That was prevented by the order of the 12th of September, because Mr. *Osborne* admitted that when I made that order Mr. *Ferrior* had neither been in possession of any part of the estate, nor had he received a single shilling of the rent. As I have already said, I cannot treat him as being in possession. But if I refrain from appointing a receiver, what will be the consequence? There are three claimants. The tenants cannot pay rent to any, nor can any one give a title to the tenants, nor will the tenants incur the risk of laying out money upon the estate and keeping it in repair. To the tenants, therefore, this state of things is the greatest inconvenience, and much difficulty would arise from the estate not being protected. On the other hand, if a receiver is appointed, whichever of the claimants succeeds in shewing a title will have the advantage of having had the property well managed and the rents accumulated for him. Upon principle, my opinion is entirely in favour of the interference of the Court to protect the property pending the litigation.

The principles of the Court being decidedly in favour of the application, I did not feel myself in any doubt at the conclusion of the arguments; but I thought it was my duty, out of respect to those arguments, carefully to consider the authorities which were so strenuously pressed on me. The first, in point of date is *In re Fitzgerald* (2 Sch. & Lef. 432), which was peculiar. One of the parties claimed under a deed and the other under an adverse title, so that whichever might obtain possession it was clear that legal proceedings would be taken by the other. Lord *Redesdale*, after laying down the rule that where the heir is found it is the duty of the committee to hand over the estate to him, says:—"As Mr. *Fitzgerald*, therefore, has thought fit to put himself into the situation of committee, and as such is under the control of this Court (which control, I think, does not determine by the death of the lunatic), he continues liable to account, and liable to all the consequences of any misconduct on his part, and bound to act in delivering possession as the Court shall direct. I think I ought to make an order to restrain him from receiving rents, or interfering with the estate by virtue of his possession as committee, without prejudice to any proceedings which he may think fit to take, by ejectment or otherwise, to recover possession as heir, as he may be advised. If it is thought fit by Sir *Jerome Fitzpatrick*," —that is the person who claimed adversely—"to institute any suit for the purpose of preserving the estate in the meantime, he may do so. I will not order the possession to either party. It is to be considered as retained in the hands of the committee, just as it would be if the Master had been the committee." What could Lord *Redesdale* have referred to when he said, "If it is thought fit by Sir *Jerome Fitzpatrick* to institute any suit for the purpose of preserving the estate in the meantime?" There could be but one way of preserving the estate, that would be by the appointment of a receiver until the right was decided. Then in *Stilwell* v. *Wilkins* (6 Madd. 49; Jac. 280), the Plain-

has restrained us from receiving the rents. The interim order was at an end on the 20th of December, and *Ferrior*, when he received the rents, had never heard of the fresh interim order

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tiff filed his bill to set aside the sale of an estate on the ground that it had been sold by his predecessor in title at an under value. The Defendant, who was the purchaser, had the legal estate under the purchase deed. One would have supposed that if the strict principle contended for by Mr. *Ferrior's* counsel were to be applied, the Court would have refused to interfere until the Plaintiff had set aside the deed. There was no suggestion of insolvency on the part of the Defendant, or that the rents would have been in any danger pending the litigation, and yet, because a probable case was made, both Sir *John Leach* and Lord *Eldon* undoubtedly and unhesitatingly appointed a receiver. Then *Jones* v. *Jones* (3 Mer. 161) is an important case, because it shews the inclination of the mind of that very great Judge, Sir *William Grant*, upon such a question. He did not grant a receiver, and he thus expresses his reasons:—"No case was cited in which the Court has interfered at the suit of heir or devisee to restrain waste, spoil, or destruction by either, while they are litigating their adverse rights in a Court of Law. One should think the case of the devisee a stronger one than that of the heir, because till the will is set aside the *primâ facie* title is in the devisee. Yet, in *Smith* v. *Collyer* (18 Ves. 89), an injunction was refused when applied for by the devisee against the heir. I own I cannot see a very good reason why the Court which interferes for the preservation of personal property pending a suit in the Ecclesiastical Court, should not interpose to preserve real property pending a suit concerning the validity of the devise. But as a condition of such interference the Court would certainly expect it to be shewn that the party applying was proceeding with all due expedition to bring the question to a decision; whereas here, the Plaintiff filing the bill about two years and a-half after the testator's death, does not state that even then any action had been brought, whilst the acts of waste and destruction complained of are stated to have been committed soon after the death of the testator. If the Court will not interpose to stay waste, *à fortiori* will it refuse to appoint a receiver, or to restrain the devisee from exercising other acts of ownership over the property?" That shews the inclination of Sir *William Grant's* mind. He stated he saw no reason why the Court should not interfere as to real estate as well as personal, his reason for not interfering being that the Court will not interfere to restrain waste. It is, however, perfectly clear that the Court will now interfere to restrain waste, and therefore that law which restrained him from appointing a receiver is no longer in operation, and I have no doubt whatever, that in the present case Sir *William Grant* would have appointed a receiver. It must also be considered that what had great influence with him was the delay of the Plaintiff in that case. Then in the modern case of *Bainbrigge* v. *Baddeley* (13 Beav. 355; 3 Mac. & G. 413), the testator had made two wills, one of 1818, which had been opposed by the heir. The will of 1818 had been established against the heir and the devisee was in possession. Subsequently, a will of three years' anterior date (1815) was brought forward by the Plaintiff. A

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made on that day. There is, therefore, no case against him as to conduct, and the rents ought to be given back to us.

[The Court desired Counsel for the Respondents to confine their arguments to the question of appointing the receiver.]

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trial took place, and a verdict was given in favour of the will of 1815; but when an application for a receiver was made, a rule for a new trial had been granted by the Court of Common Pleas; and therefore, although there had been a verdict in favour of the anterior will, there had been no judgment; and yet under these circumstances Lord *Langdale* granted a receiver, because he thought it proper to grant protection to the property pending litigation between the adverse claimants. Upon appeal Lord *Truro* reversed this decision, because he did not think it a case for the appointment of a receiver, the verdict not having been followed by judgment. There was no suggestion, I think, that the rents were in danger, though the devisee under the latter will had received them to a considerable amount. Of course I must take the law from the Lord Chancellor, not from the Master of the Rolls; but, at the same time, one was a very experienced Judge in Equity, and the other was a Judge who only recently came from common law. Therefore I cannot consider the case of any great weight on the subject. Now, with regard to the earlier authorities, there is *Mordaunt* v. *Hooper* (Amb. 311), the fair conclusion to be drawn from which, no doubt, is that Lord *Hardwicke* appointed a receiver against the legal estate with reluctance. Nevertheless, it points out that although the Court does it with reluctance, still it does do it where there is a proper case. Then I come to two authorities which are mainly relied upon by Mr. *Osborne*, namely, the two decisions in *Talbot* v. *Hope Scott* (4 K. & J. 96, 139). In the first case, Mr. *Hope Scott* and his co-trustees were in possession of large estates under the will of the late Earl of *Shrewsbury*, who was supposed to have been seised in fee, and it was perfectly clear that if he were seised in fee, his will had vested the legal estate in Mr. *Hope Scott* and Mr. Serjeant *Bellasis* as trustees. They had been in possession about two years and a half; there was no suggestion of danger; the rents were perfectly safe in their hands; and ultimately they gave an undertaking not to part with them without leave of the Court. The question which the Vice-Chancellor had to deal with was this:—Where a devisee is in possession with an absolute title, and a person makes a claim who has not proved it, will this Court interfere? The judgment in the first case, in which the Court declined to interfere, is one which I should follow entirely under the particular circumstances of that case. Then there was a second application with respect to another part of the estate, of which the trustees were not in possession, and of which they had not received the rents, and there the Vice-Chancellor did appoint a receiver. Therefore I think that case does not militate against the general rule of the Court that where a proper case is presented the Court will interfere. I need not refer to any other authorities except one, *In re Butler* (Law Rep. 1 Ch. 607), which, I confess, I regard as of the highest possible importance, and particularly applicable to the present

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Mr. *Glasse*, Q.C., and Mr. *Mackeson*, Q.C., for *Carrow*:—

In *Talbot* v. *Hope Scott* (1) a receiver was granted, and in the present case there are special grounds for doing so, *Ferrior* having obtained possession by collusion with the solicitor of the committee, which reduces the case to one of vacant possession: *Ex parte Clarke* (2); *In re Fitzgerald* (3). The *dictum* of Lord Justice *Turner* in *In re Butler* (4) is strong in our favour. [*Jones* v. *Jones* (5); *Haigh* v. *Jaggar* (6); *Lowndes* v. *Bettle* (7); *Stilwell* v. *Wilkins* (8); *Cruikshank* v. *Robarts* (9); and *White* v. *Smale* (10), were also referred to.]

Sir *Roundell Palmer*, Q.C., and Mr. *Schomberg*, Q.C., for *Dunn*:—

Where there is a scramble for possession the Court will interfere

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case. An application was made to the Lords Justices by the committees of the estate to deliver up the estate to them, the committees of the person having got into possession. Lord Justice *Knight Bruce* did not express any opinion, but Lord Justice *Turner* goes fully into it, and I rely upon the judgment of that distinguished Judge, whose judgments must always have great weight in this Court. It was a case of adverse litigation, not between persons claiming as heirs, but, what comes to precisely the same thing, between parties claiming as co-heiresses and a party claiming as remainderman. If the remainderman was entitled, he had a legal title; if, on the other hand, the co-heiresses were entitled, they had a legal title immediately on the death of the lunatic. It was therefore like the present, a case where there were adverse claims to the legal estate. Therefore can I suppose that when Lord Justice *Turner* said, "They (the co-heiresses) might have followed this up by filing a bill in Equity for a receiver," he had not satisfied himself that upon principle and practice the Court would have sanctioned the appointment of a receiver where there was an adverse litigation, even where it was as to real estate? I can find nothing adverse to this on the authorities; and on principle I am decidedly of opinion that a receiver ought to be appointed. So far from thinking myself impeded by the authorities, I find myself fortified by them. On principle and authority, therefore, I have no hesitation whatever in coming to the conclusion that this is a case in which it is proper and for the benefit of all parties that the estate should be protected by the appointment of a receiver pending the litigation. I must, however, as Sir *W. Grant* did in *Jones* v. *Jones*, make it a condition that those upon whose application the appointment is made shall prosecute their claims with all possible diligence.

(1) 4 K. & J. 139. 4 Jur NS 1172
(2) Jac. 589.
(3) 2 Sch. & Lef. 432.
(4) Law Rep. 1 Ch. 607.
(5) 3 Mer. 161, 173.
(6) 2 Coll. 231, 236.
(7) 12 W. R. 399. 10 Jur NS 226
(8) 6 Madd. 49; Jac. 280.
(9) 6 Madd. 104.
(10) 22 Beav. 72.

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to protect the property. Where a person is in possession the Court will not interfere against him by the appointment of a receiver where the titles are legal, but the cases are not to be extended: *Davenport* v. *Davenport* (1). Here no one can be considered in possession, *Ferrior* having only obtained possession surreptitiously, *pendente lite*, and in defiance of an order of the Court. Moreover, it was obtained by abuse of a fiduciary position, *Mathias* having, so to say, the goodwill of the possession. *Ferrior*, being introduced by *Mathias*, did not get into possession independently, but through a person in the confidence of the Court. The case comes within the principles laid down in *Davenport* v. *Davenport*, *Jones* v. *Jones* (2), and *In re Fitzgerald* (3), as to the abuse of a fiduciary position, and a receiver ought to be granted.

SIR W. PAGE WOOD, L.J.:—

In this case there are three claimants, none of whom has established his title as heir-at-law. There is no privity or concert between them. There is nothing binding any of them to take any other course than that of standing on his strict rights, and we are asked to decide that one of them can come here and ask the Court to put a receiver in possession, though there is no allegation of any impediment to a trial at law beyond the existence of outstanding terms. I considered this point much in *Talbot* v. *Hope Scott* (4), but do not regret having heard it re-argued, though, considering the vast amount of property involved in that case, and the hostile feeling between the parties, the fact of there having been no appeal is significant. I then came to the conclusion that there was no jurisdiction to appoint a receiver on the application of a claimant who was out of possession, and did not claim by an equitable title, and I am still of the same opinion. The Plaintiff's case was there rested on the ground of the Court's jurisdiction to interfere for the protection of property pending litigation, but that question had been fully discussed in *Jones* v. *Jones*, which seemed to me to have so settled the law that I ventured to say there had been no case for twenty years in which a person claiming

(1) 7 Hare, 216.
(2) 3 Mer. 161.
(3) 2 Sch. & Lef. 432.
(4) 4 K. & J. 96.

by a dry legal title as heir-at-law, and out of possession, had ever attempted to obtain the appointment of a receiver.

The question as to the effect of outstanding terms is disposed of by *Bainbrigge* v. *Baddeley* (1). The Vice-Chancellor has observed upon this decision as being the reversal by the Lord Chancellor of a decision by a Judge having much greater experience than himself in Courts of Equity, but I can only look at it as a judgment of a Lord Chancellor differing from an inferior Judge. It was held in that case that the existence of outstanding terms makes no difference as to the appointment of a receiver, the course of the Court being merely to put the outstanding terms out of the way, and not to treat them as introducing any new equities.

It was urged, that this is not a case where the Court is asked to turn any one out of possession, but a case where the possession is vacant, and that the Court will interfere to protect the property as it does to protect personal estate pending a litigation as to probate. I had occasion to consider this in *Talbot* v. *Hope Scott* (2), and I observed that the two cases were different. It may be true, on the highest general principles, that there ought to be no difference in this respect between real and personal property, but our law clearly regards them very differently, and looks upon the person in possession of real estate as entitled to keep it till some one else shews a better title. Unless the person in possession of real estate is affected by some equity, this Court will not interfere. The consideration is not unimportant, that personal estate may be made away with altogether, if this Court does not interfere, but only the rents of real estate can be lost. But, in my opinion, the leading principle governing the case is, that this Court does not interfere as to real estate unless there is an equity. In *White* v. *Smale* (3) the circumstances were very peculiar, and possession was in every sense vacant. Here there are tenants in possession. Any claimant can ask them to attorn, and if they refuse, can bring his action.

As regards *Mordaunt* v. *Hooper* (4) the circumstances of that case were very peculiar, and may be sufficient to take it out of the general rule; if not, it must be considered as overruled by the later authorities.

(1) 3 Mac. & G. 413.
(2) 4 K. & J. 96.
(3) 22 Beav. 72.
(4) Amb. 311.

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Sir *Roundell Palmer* pressed us with the argument that this was originally the property of a lunatic, and that, the possession being in the hands of the Crown, the Crown was a *quasi* trustee, and would not allow the possession so acquired to be dealt with by any of the parties. It is true, as was exemplified in *Ex parte Clarke* (1), that the Court will not allow a person who obtains possession in a fiduciary character to use that possession for his own benefit, or so as to confer a benefit on a stranger to the trust. The case of *In re Butler* (2) shews the principle on which the Court proceeds in such cases, and it falls far short of the proposition that after the office of the committee has determined, and his possession of the property has ceased, the gentleman who has been his solicitor cannot act as solicitor for one of the adverse claimants. The Lord Justice *Rolt* founded his judgment in the present case on the principle that the case was reduced to the simple one of three persons claiming adversely to each other as heirs, and that, the office and title of the committee having ceased, there was no jurisdiction to interfere.

The only remaining point to be considered is, whether *Ferrior* has so conducted himself as to make the appointment of a receiver proper. An *ex parte* order was made in the Long Vacation restraining him from receiving the rents, and it was afterwards continued until the hearing before the Vice-Chancellor. When the case came on before the Vice-Chancellor, he desired that it might be brought before the Lords Justices, along with an application in lunacy. The Lord Justice *Rolt* decided that there was no jurisdiction in Lunacy, and remitted the case to the Vice-Chancellor. The question, under these circumstances, is raised, whether the interim order was in force till the case came on before the Vice-Chancellor, or until it was disposed of. In our opinion an interim order, if nothing is said to the contrary, continues until the case is disposed of by the Court, and we do not think that *Ferrior* was justified in taking possession without any notice to the other side of his intention to act in contravention of the order, and we, therefore, do not vary the order as to the rents received by him, but we are of opinion that the order for a receiver must be discharged. If we were to lay down that where a person obtained attornment

(1) Jac. 589. (2) Law Rep. 1 Ch. 607.

by holding out inducements to the tenants a receiver may be appointed, where are we to stop? We say nothing as to what might be done in the case of a contest between a person with a well-established pedigree and a person without any reasonable show of title; every case must stand on its own circumstances, and here we have nothing of that kind. The Vice-Chancellor appears to have relied very much on the *dictum* of the Lord Justice *Turner* in *In re Butler* (1), but that *dictum* cannot be accepted in all its breadth, it must either have been uttered *per incuriam*, or must have been qualified by circumstances not appearing in the report. His Lordship cannot have intended deliberately to lay down as a general rule that a person claiming an estate by a legal title can, by calling upon the tenants to pay their rents to him, entitle himself to apply to this Court for a receiver. The order for a receiver must be discharged.

SIR C. J. SELWYN, L.J.:—

I agree that the order as to the rents received by *Ferrior* in December, 1867, should not be disturbed, for it is necessary to enforce the observance of the strictest good faith in proceedings of this nature.

As to the order for a receiver, I have but little to add. There are before the Court three persons claiming the property by independent legal titles. It is admitted on all hands that in general the Court will not interfere where the only contest is who is entitled to a legal estate as heir-at-law, but it was contended that the present is an exceptional case. *Mordaunt* v. *Hooper* (2) was chiefly relied on, but in that case there was strong ground of title, and danger of the rents being lost. It was said in argument that these were only illustrations of the grounds on which the Court would grant a receiver, but in *Bainbrigge* v. *Baddeley* (3) they are treated as essentials. The second branch of the case of *Talbot* v. *Hope Scott* (4) has no bearing on the present case. Then it is said that possession has been obtained improperly, but I see nothing to prevent Mr. *Mathias* from acting as *Ferrior's* solicitor, his connection with the estate as solicitor of the committee having

(1) Law Rep. 1 Ch. 607.
(2) Amb. 311.
(3) 3 Mac. & G. 413, 419.
(4) 4 K. & J. 139.

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determined, and the Lord Justice *Rolt* clearly expressed himself as being of the same opinion. The *dictum* of Lord Justice *Turner* in *In re Butler* (1) cannot have been intended by him to be understood in as wide a sense as its terms import. The case of *Stilwell* v. *Wilkins* (2), on which the Vice-Chancellor seems to have relied, has no bearing on the point before us. The Plaintiff there came under an ordinary head of equitable jurisdiction to set aside a purchase-deed, and there could be no doubt as to the jurisdiction of the Court to appoint a receiver to protect the property during the litigation upon a sufficiently strong case being shewn, the Plaintiff's title being an equitable one. I am of opinion that here the Plaintiff's case fails, and that the order for a receiver must be discharged.

Solicitors: Messrs. *Jones & Blaxland;* Messrs. *Eyre & Co.;* Messrs. *Miller & Miller.*

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PALMER *v.* WALESBY.

Unsound Mind—Next Friend—Taking Bill off the File—Costs.

M. filed a bill as next friend of *P.*, whom he alleged to be of unsound mind. An application in Lunacy was directed, and *P.'s* sanity was established. *P.* thereupon applied to have the bill taken off the file, which was ordered, but without any directions as to costs. *P.* moved the Court of Appeal to vary this order by directing the next friend to pay his costs as between solicitor and client, and the Defendant moved to vary it by inserting a direction for the next friend to pay her costs:—

Held, that *P.* was entitled to indemnity against all consequences of the suit having been instituted in his name, and that *M.* must pay *P.'s* costs as between solicitor and client of the application to the Court below, and of *P.'s* appeal motion, and must pay the Defendant's costs of the suit as between party and party, including the costs of motions in the Court below and on appeal.

THIS case came before the Court on two motions by way of appeal from an order of Vice-Chancellor *Malins.*

A bill was filed in the name of Mr. *Palmer*, by a relative named *Moon*, as his next friend, against Mrs. *Walesby*, who was *Palmer's* housekeeper. The bill stated *Palmer* to be of unsound mind,

(1) Law Rep. 1 Ch. 607. (2) Jac. 280.

though not found so by inquisition, and alleged misconduct and undue influence on the part of Mrs. *Walesby*, and prayed, among other things, for an injunction to restrain Mrs. *Walesby* from marrying *Palmer*, and from having any intercourse with him. On the 6th of December, 1867, Vice-Chancellor *Malins* stayed all proceedings in the cause until further order, on an undertaking by *Moon* to take proceedings in Lunacy, and on Mrs. *Walesby* giving certain undertakings. *Moon* accordingly presented a Petition in Lunacy for an inquiry as to *Palmer's* state of mind, and the Lords Justices, on hearing it, came to the conclusion that *Palmer* was of sound mind, and dismissed the Petition with costs. *Palmer* then moved before the Vice-Chancellor to have the bill taken off the file, which was ordered; but the Vice-Chancellor declined to give any direction as to costs.

Palmer moved, by way of appeal, that the order might be varied by ordering *Moon* to pay *Palmer's* costs of the motion before the Vice-Chancellor, and consequent thereon and incident thereto, and of the present motion, and consequent thereon and incident thereto, all such costs to be taxed as between solicitor and client. Mrs. *Walesby* moved that the order for taking the bill off the file might be discharged with costs, but if the Court should be of opinion that the bill ought to be taken off the file, then that the order might be varied by directing *Moon* to pay the Defendant her costs of the suit, including the costs of the motion before the Vice-Chancellor and of the present motion, as between solicitor and client.

Mr. *Bacon*, Q.C., and Mr. *Bovill*, for *Palmer*:—

The bill having been filed without authority in the name of a person who is proved to be sane, the next friend must indemnify the nominal Plaintiff against all consequences of its having been filed, including the costs of the motion to take it off the file: *Davis* v. *Williams*, before the Lords Justices on Feb. 13, 1868; *Wade* v. *Stanley* (1); *Melling* v. *Melling* (2); *Anon.* (3).

Mr. *Glasse*, Q.C., and Mr. *Nalder*, for *Moon*:—

The motion is unnecessary, for *Palmer* is not liable for costs to anybody, so there is nothing against which he requires indem-

(1) 1 Jac. & W. 674. (2) 4 Madd. 261. (3) 4 Madd. 461.

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nity. It is also inadmissible as being an appeal for costs alone: *Chappell* v. *Gregory* (1); *Taylor* v. *Popham* (2); *Lewis* v. *Smith* (3); *Chappell* v. *Purday* (4). This case is not within the exception. Mr. *Palmer* wishes the merits to be gone into for the purpose of deciding as to costs; the question of merits being whether there was reasonable ground for suspecting his sanity: *In re F*—— (5).

Mr. *J. H. Palmer*, Q.C., and Mr. *Fischer*, for Mrs. *Walesby*, in support of her motion:—

There is no question of merits; the merits have been decided in Lunacy. As an inquiry into *Palmer's* state of mind was held unnecessary, there cannot have been reasonable ground for this suit. But whatever be the merits as between the Plaintiff and the next friend, the Defendant, who cannot bring this suit to a hearing, must have her costs provided for: *Morgan* and *Davey* on Costs (6); *Blake* v. *Smith* (7). An appeal for costs will lie, for it is a settled rule that a bill filed without authority should be taken off the file with costs: *Allen* v. *Bone* (8); *Crossley* v. *Crowther* (9); *Atkinson* v. *Abbott* (10).

Mr. *Glasse*, Q.C., and Mr. *Nalder*, for *Moon*, on Mrs. *Walesby's* motion:—

Mrs. *Walesby's* motion is irregular: *Jerdein* v. *Bright* (11). A Respondent cannot after supporting a motion in the Court below, appeal from the order and introduce a quantity of fresh matter. One branch of Mrs. *Walesby's* motion is to discharge the order altogether and let the suit go on—which is opposed to her contention before the Vice-Chancellor, and is inconsistent with the other part of her notice of motion.

SIR W. PAGE WOOD, L.J.:—

With regard to the motion of the nominal Plaintiff, Mr. *Palmer*, the case stands thus—Mr. *Moon*, without any authority whatever,

(1) 2 D. J. & S. 111.
(2) 15 Ves. 72, 78.
(3) 1 Mac. & G. 417.
(4) 2 Ph. 227.
(5) 2 D. J. & S. 89.
(6) Page 62.
(7) You. 594.
(8) 4 Beav. 493.
(9) 9 Hare, 384.
(10) 3 Drew. 251.
(11) 10 W. R. 380.

has filed a bill in the name of Mr. *Palmer*, describing him as a person of unsound mind, incompetent to judge for himself, and undertaking to act as his next friend. The bill seeks, among other things, to restrain the Defendant from any intercourse with the Plaintiff. The Vice-Chancellor as soon as he found that the Plaintiff's unsoundness of mind was disputed, suggested that the dispute should be brought to an issue by Mr. *Moon*, the next friend, undertaking to make an application in Lunacy for an inquiry whether the Plaintiff was or was not of sound mind. The application was made, and it was established that the Plaintiff was not of unsound mind. The Vice-Chancellor then considered, and in this we entirely agree with him, that the case was at an end, and that there was no course open but that of taking the bill off the file, which His Honour accordingly directed to be done; but in doing so, made no provision either for the costs of Mr. *Palmer*, in whose name the bill had been filed, or as to the costs of Mrs. *Walesby*, who had been brought here as Defendant and been put to considerable expense.

As regards Mr. *Palmer*, his position is this:—He does not come as a lunatic to this Court, nor is he a party to any suit in this Court. But he says, and I apprehend he is quite entitled to say, "I desire to inform the Court that its process has been abused by my having been made Plaintiff in a suit which I have not authorized." The case in that respect is the same as the more ordinary case of a person coming to inform the Court that a solicitor has abused its process by filing a bill in his name without authority. There is, indeed, this difference, that the very circumstance of a solicitor using the name of a person as Plaintiff involves the person whose name is so used in liability to the Defendants, since they are not bound to look to the authority of the solicitor. But, notwithstanding this difference, the cases are similar in principle, and Mr. *Palmer* is entitled to say, "I come to ask the Court to take this bill off the file, to remove from me the stigma which attaches to me from its appearing on the records of the Court that I am of unsound mind, and to take care that I am not subjected to any expense in consequence of these proceedings."

The first objection taken to Mr. *Palmer's* present application is

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that he is under no liability for any costs of suit, and that this is therefore merely an appeal as to the costs of his motion before the Vice-Chancellor, and ought to be dismissed, as being an appeal on a mere question of costs. Now, this case may seem to be nearer than some of those which have been cited to the line beyond which appeals for costs are not allowed; but, looking at it on principle, and according to its real substance and essence, it seems to me to be far within that line. It is not the case of a party to a suit making an application which he wishes to be heard on the merits as to whether he has done this thing or that thing rightly or wrongly; it is the case of a person who comes here upon the question whether he is or is not a suitor in this Court. If he is not of unsound mind, he is not a suitor; and when it is once established that he is not, there is nothing more to try. Now, the principle on which the Court has said that it will not hear appeals on costs is this: the Court will not rehear the merits for the purpose of deciding the simple question of costs alone. But in this case, when it has once been established that Mr. *Palmer* is of sound mind, there is no question of merits at all. Moreover, he is not asking for ordinary costs; he comes here to obtain full and complete indemnity against all the consequences of an unauthorized suit having been instituted in his name, and to such indemnity I apprehend that he is entitled. The only costs for which he has, in fact, become liable are the costs of the motion in the Court below and here, but these are not to be considered as ordinary costs to be dealt with on the principles according to which the Court usually disposes of the costs of a motion. It has been established that Mr. *Palmer* is not of unsound mind; the suit therefore is not his suit, and there are no merits to try; the question is only one of indemnity. I have endeavoured, with the advantage of having the judgment of the Vice-Chancellor before me, to form an idea what question of merits there can possibly be in such a case, and I cannot imagine any but this, that a person might purposely pretend to be of unsound mind, and thereby induce the next friend to act on his behalf. No such case having been raised here, it is almost impossible to conceive that any merits can arise when once the fact is ascertained that the nominal Plaintiff is not a suitor of the Court. He comes here for full indemnity; that

full indemnity he must have; and on that principle we decide that he must have his costs as between solicitor and client paid to him both in this Court and in the Court below.

The case of Mrs. *Walesby*, the Defendant, is still stronger. Her case is that she was brought here by one who alleged the person in whose name he sued to be of unsound mind, and therefore claimed to be entitled as next friend to sue on his behalf, and that she was compelled to appear in that suit on a motion to restrain her from having any intercourse with the nominal Plaintiff, or from marrying him, she at the time being his housekeeper. She has a right to say that the bill must not be taken off the file without paying her costs as those of an ordinary Defendant. She clearly cannot have them as between solicitor and client, for the Plaintiff might at any time have obtained an order of course to dismiss his bill with costs as between party and party. She can only have such costs as she would in that case have been entitled to, but to those costs she is entitled. Under the circumstances which have occurred, the cause never can be brought to a hearing; she never can have an opportunity of being heard upon the merits; she therefore must have her costs in the same way as if the bill had been dismissed. Mr. *Glasse* urged that a Defendant is never brought before the Court upon a motion to take off the file a bill which has been filed without authority. That is so, but it is only because the Plaintiff is liable for costs to the Defendants, they not being bound to look into the authority of the Plaintiff's solicitor, who is an authorized officer of the Court. The motion therefore does not affect the Defendants. The form of the Defendant's notice of motion, which has been much observed upon, seems to us quite proper. The Defendant, of course, could not know what course the Court might choose to adopt, and by her notice of motion she says, in substance: "Either let the Vice-Chancellor's order be discharged altogether, in which case I am prepared to go on to a hearing, and contest the case upon its merits, or if the Court prefers taking the bill off the file, then let me have my costs as between party and party." The proper course will be to make one order upon these two notices of motion, to order the costs of the Plaintiff as between solicitor and client, and the costs of the Defendant as between party and party in the cause, includ-

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ing the costs of all the motions both in the Court below and here, to be paid by the next friend.

SIR C. J. SELWYN, L.J.:—

With respect to the first motion, I am not at all disposed to relax that very useful rule which prohibits appeals merely for the sake of costs, nor to enlarge the exceptions made to that rule, but I think the present case falls entirely within the exceptions as laid down in *Chappell* v. *Purday* (1), for I think a very important question of principle is involved in the manner in which the costs of the motion by Mr. *Palmer* have been disposed of. He, having been wrongly alleged to be a person of unsound mind, and as such made Plaintiff in a suit, comes before the Court, and says: "I find there is upon the records of the Court a bill in which I am the nominal Plaintiff, which was filed against my wish, and which I therefore desire to have removed." Does he not, under such circumstances, rightly come to the Court? Is he to allow this suit to go on because it may be that the next friend alone is liable to the costs? I do not think it necessary to consider the question whether, if a person in whose name a bill has been filed by a next friend on the ground of his being of unsound mind, stands by after his sanity has been established, and allows the suit to be prosecuted, he might not incur some liability as to the costs; but of this I am quite clear, that he has a right to come at the earliest possible moment to insist upon having the suit stopped, and to claim the costs of the necessary application. I think that is a matter of principle which justifies the present appeal, and allows us to give to Mr. *Palmer* not only the costs in the Court below, but also the costs of the motion which he has been obliged to make here to obtain his right.

With regard to Mrs. *Walesby's* application, two objections have been relied upon against it. It is said, in the first place, that she appeared by her counsel in the Court below, and supported Mr. *Palmer's* application to the Vice-Chancellor; and, secondly, that the merits have not been gone into; and that if they be gone into, the Plaintiff has a right to cross-examine her, because she has been lying under a subpœna to be cross-examined. With

(1) 2 Ph. 227.

respect to the first objection, I think that the course which Mrs. *Walesby* took was a very reasonable one. Mr. *Palmer's* application being made in a suit the continuance of which she did not desire, it was not necessary that she should oppose that application, but she said, "My costs must be provided for." She says nothing more now. I think it cannot justly be said that she is taking a course inconsistent with the course she took in the Court below. Her case from the beginning to the end has been simply this: if this case is put an end to before I have an opportunity of being heard upon the merits, the same rule must apply as when a Plaintiff dismisses his own bill, and the costs must be paid by the Plaintiff to the Defendant. I think, therefore, that the first objection wholly fails.

The second objection is as destitute of foundation, and I think it is impossible to state it without at once seeing the fallacy which lies at the root of it. The objection is, that the merits have not been gone into; and that if they be gone into the Plaintiff has a right to cross-examine Mrs. *Walesby*. That objection overlooks entirely the question as to whether there can be any merits in such a suit, when the Plaintiff himself says: "This is not my suit, and I do not desire it to be prosecuted at all." What possible right can the next friend have to cross-examine anybody when the person in whose name the bill is filed comes forward and says: "Whatever the merits, supposing the Defendant has been guilty of every imaginable fraud, I do not desire to prosecute the suit against her." I think the objections are wholly groundless, and I quite agree that the costs which are to be paid by Mr. *Moon* should include the costs of both motions before this Court.

Solicitors: Messrs. *Scott & Co.*; Messrs. *C. & H. Bell.*

L. JJ.
1868
July 28.

WING *v.* TOTTENHAM AND HAMPSTEAD JUNCTION RAILWAY COMPANY.

Railway Company—Unpaid Vendor—Order for Sale of Part of Railway—Lands Clauses Act, s. 85.

A vendor of land to a railway company who have entered and used it for the purpose of their railway is entitled to the same lien on the land for the unpaid purchase-money, and the same remedies for enforcing it, as an ordinary vendor.

Therefore where a landowner had sold land to a railway company, on some of which they had entered, under the 85th section of the *Lands Clauses Act*, and on the rest under an agreement with the vendor, and the vendor had obtained a decree for specific performance and for payment of the purchase-money within three months:—

Held (affirming the decree of *Malins*, V.C.), that, in default of payment the vendor was entitled to a sale of the land, although the railway was actually made, and ready for traffic.

THE bill in this case was filed by *Thomas Twining Wing* against the above-named company for specific performance of two agreements for the purchase of certain lands at *Hornsey* required by the company for the purpose of their railway.

The company took possession of part of the lands in question, amounting to about seven acres, under the 85th section of the *Lands Clauses Act*, and paid into Court £4900, and gave a bond for a like amount under the provisions of that section.

Subsequently the company required other land, and by virtue of two agreements, dated the 29th of August, 1865, and the 27th of October, 1866, the Plaintiff agreed to sell to the company certain land, amounting to about fifteen acres, including the seven acres previously taken, for the price of £10,249 7*s.* 6*d.* The company was, thereupon, let into possession of the remaining land, and had completed their railway over it, but had paid no part of the purchase-money. The Plaintiff accordingly filed his bill, praying for specific performance of the agreements, and, in default, for a sale of the lands comprised in them, and for a receiver in the meantime.

The sum of £4900 deposited was paid out of Court to the Plaintiff on an interlocutory application.

On the 18th of November, 1867, Vice-Chancellor *Malins* made a decree directing specific performance of the agreement, and payment of what should be found due for purchase-money, interest, and costs, within three months, and declaring that the Plaintiff was entitled to a lien on the land sold by him, and that, in default of payment within three months, he was to be at liberty to apply as he might be advised. (3 H & M 140)

On the 19th of June, 1868, the sum due from the Defendants, which the Chief Clerk had certified to amount to £6141, being still unpaid, the Vice-Chancellor made an order, on the motion of the Plaintiff, that the land comprised in the agreements, or so much as should be necessary to raise the sum found due, might be sold, and the proceeds paid into Court.

The Defendants appealed both from the decree and the order for sale, and by arrangement the two appeals were heard together. Before the appeals came on to be heard the railway had been actually opened for traffic.

Mr. *Cotton*, Q.C., and Mr. *Townsend*, for the Appellants:—

We admit that similar orders to the order for sale now appealed from have been made by some branches of the Court, but none have been sanctioned by the Court of Appeal, and it is of the greatest importance that the matter should be set at rest. We contend that a sale to a railway company stands on a different footing from an ordinary sale. The vendor knows when he lets the company into possession that the land is wanted for a public purpose, and he cannot recover it if the purchase-money be unpaid. He therefore gives up the ordinary lien of a vendor, and trusts to his other remedies. He may have a receiver of the profits, but he cannot regain possession, or enforce a sale. It has been determined at law that he cannot recover the land by ejectment: *Hudson* v. *Leeds and Bradford Railway Company* (1). In many of the cases where orders for sale have been granted by the Court the railway has been practically abandoned.

With respect to the land taken under the 85th section the case is still stronger. The Act gives the company special powers to enter and use the land, and when they have complied with the

(1) 16 Q. B. 796.

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terms imposed by the Act, and used the land for their railway, the public have acquired rights which the landowner cannot interrupt.

[They also referred to the following cases: *Walker* v. *Ware, Hadham, and Buntingford Railway Company* (1); *Cosens* v. *Bognor Railway Company* (2); *Pell* v. *Northampton and Banbury Railway Company* (3); *In re Bishop's Waltham Railway Company* (4); *Raphael* v. *Thames Valley Railway Company* (5); *Gardner* v. *London, Chatham, and Dover Railway Company, Ex parte Grissell* (6).]

Sir *Roundell Palmer*, Q.C., Mr. *Osborne*, Q.C., and Mr. *C. Hall*, for the Plaintiff, were not called on.

SIR W. PAGE WOOD, L.J.:—

I feel the importance of the question, and if I had not had the opportunity of considering it in other cases I should have desired to hear the Respondent's counsel. But many orders of the same kind have been made, some of them by myself when Vice Chancellor, and now that I have heard the arguments for the Appellants I cannot say that the conclusion I had already come to is at all shaken by them. I cannot conclude that Parliament intended to take away property from a landowner without his being paid for it unless I find a clear expression of intention to that effect. On the other hand, we must assume that the Legislature knew that owners of land have rights which have been long recognised by this Court, among which is this, that the land sold remains in the eye of this Court subject to the lien of the vendor until it is paid for. That being so, the Court must uphold that right until it is expressly taken away. I find nothing in the *Lands Clauses Act* which would have that effect. The 85th section does nothing of the kind. After having previously made careful provision for the payment of the landowner, the Legislature, seeing that there might be some unavoidable delay in the completion of the sale, and that time might be an object to the company, provides that they may deposit a

(1) Law Rep. 1 Eq. 195. (4) Law Rep. 2 Ch. 382.
(2) Ibid. 1 Ch. 594. (5) Ibid. 147.
(3) Ibid. 2 Ch. 100. (6) Ibid. 385.

sum of money, and also give a bond, and then may take and use the land. But does that give them the ownership of the land? When the Legislature intended that the ownership should pass they used very different language. For instance, in the 75th and 77th sections, which provide for the cases of the owner of the land being unable to make a good title, or making default in executing a conveyance after the purchase-money which has been awarded to him has been duly deposited, or being absent from the country, the promoters of the undertaking are empowered to execute a deed-poll, and then the owner's estate "shall vest absolutely in the promoters of the undertaking." It appears to me that the distinction is plain between the case in which the land is to vest in the company and where they are to "take and use it." Where they pay all the purchase-money, the land is to vest in them; where they pay only a part—practically they pay about a fourth of the value of the land—and give a bond for the like amount, they are only to enter and use the land. According to the construction contended for, we are asked to hold that in such a case the owner has parted with his land altogether; and it is suggested that he has a remedy against the company by the appointment of a receiver. But I am of opinion that unless we are to hold that the Legislature has confiscated the property of the landowner for the benefit of the public we cannot avoid saying that the Plaintiff has a lien on the land; and we cannot refuse to give him the same assistance in enforcing it that the Court gives to any other unpaid vendor. And looking at the authorities, none of which have been overruled, and the principle of which has been affirmed by the Court of Appeal (for the cases in which injunctions have been granted rest upon the same principle), being also of opinion that those decisions are entirely consonant with justice, I think these appeals must be dismissed with costs.

SIR C. J. SELWYN, L.J.:—

I agree with the counsel for the Appellants as to the importance of this question, both to railways and to landowners; but it is a question which has been often considered, and the decision of the Master of the Rolls in *Walker* v. *Ware, Hadham, and Buntingford*

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Railway Company (1), has been repeatedly followed by other branches of the Court, and no appeal has been brought from it, and I am satisfied that no further consideration of the question would lead me to any different conclusion. It is said that we are asked to depart from the whole scope of the Railway Acts; but although those Acts usually contain a recital that the making of the railway would be of public advantage, and although the Court will not allow persons claiming under the railway company (such as debenture holders), to enforce their claims in such a manner as to interfere with the public purposes to which the lands taken by the company are dedicated; yet the right of the landowner to be paid for his property is a prior and paramount right which has always been recognised even in cases of greater public importance—as in the Defence Acts, and the Acts for Enlargement of the Dockyards. Although it may be a matter of great public importance that the railway should be opened, yet it is a matter of still greater importance that the rights of property should not be violated. It is said that as to part of the land this landowner has deprived himself by his agreement of the rights which he would otherwise have had; but it is admitted that he has a lien for the unpaid purchase-money, and the agreement contains no clause by which he is precluded from the best mode of enforcing it. Then as to the rest of the land which was taken under the 85th section of the *Lands Clauses Act*, that section provides security to the vendor for the value of the land, and cannot be construed as intending by implication to preclude him from any means of enforcing payment. The deposit paid into Court is the price which the company pays for the privilege of taking immediate possession; and I think the object of that section is fully satisfied when the company have obtained possession, and that the ordinary remedies of a vendor in respect of his unpaid purchase-money remain unaffected.

Then it is said that the purchaser has stood by and thereby lost his rights. He has, however, done this on the terms of the agreement, of the deposit made by the company, and of the bond given by them, all which provided that he should be

(1) Law Rep. 1 Eq. 195. 35 Beav. 52. 12 Jur. N. S.

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paid for his land, and all he now claims is, that he may be paid accordingly.

Lastly, it is urged that the case of *Hudson* v. *Leeds and Bradford Railway Company* (1) shews that he has lost his right to recover possession of the land. That case was, however, hardly pressed to the extent of saying that the Plaintiff had no right to file a bill for specific performance of his contract, and if he was entitled to do that, how can he have lost his other rights as an unpaid vendor? But I think that the judgment of Mr. Justice *Patteson* in that case puts the matter in a clear light, and shews that what was decided was only that the vendor had no right to treat the company as mere trespassers.

I have no hesitation in saying that the whole practice of the Court shews that a vendor of land to a railway company is, with respect to his lien, in no different position from a vendor of land to any other person. I think, therefore, that both these appeals must be dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Wing & Ducane.*
Solicitor for the Defendants: Mr. *Henry Toogood.*

LORD BEAUCHAMP *v.* GREAT WESTERN RAILWAY COMPANY.

L. JJ.
1868
June 9.

Railway Company—Superfluous Land—Pre-emption—"Purposes of the Acts"—Accommodation Works.

A railway company bought from the Plaintiff a small piece of land, the whole of which, according to their original plan, would have been covered by the embankment of the railway. Being obliged to provide a communication between severed lands of another landowner, the company altered their levels so as to narrow the embankment and leave unoccupied a strip of the land purchased from the Plaintiff. This strip they turned into a road for the use of the other landowner. The Plaintiff thereupon, before the period named for the sale of superfluous lands had arrived, filed his bill to enforce a right of pre-emption as to the strip:—

Held (reversing the decision of *Stuart*, V.C.), that the land was not super-

(1) 16 Q. B. 796.

4 HL 614
7 QB 374
8 QB 30,
7 HL 289
18 Q 742
12 CLD 278
20 CLD 325
328-9 338
340, 70
20 CLD 424, 437 21 CLD 97

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fluous land, for that the making accommodation works which the company were compellable to make was one of the purposes of their Acts, and that the Plaintiff, therefore, had no title to relief:

But *held* (agreeing with the Court below), that the suit was not premature, for that if the making the road had not been one of the purposes of the Acts, the permanent dedication of the land to that purpose would have established the land to be superfluous land, so as to entitle the Plaintiff at once to enforce his right of pre-emption.

THIS was an appeal by the Defendants from a decree of Vice-Chancellor *Stuart* declaring the Plaintiff entitled to a right of pre-emption over a certain piece of land as being superfluous land, and ordering the company to convey it to him on payment of the price to be ascertained according to the *Lands Clauses Act*.

The land in question was part of a small piece of land purchased from the Plaintiff under the powers of the *Worcester and Hereford Railway Act*, 1853, by which a company was incorporated "for the purpose of making and maintaining the railways hereinafter described, with all proper works and conveniences belonging thereto." The *Lands Clauses Act*, *Railways Clauses Act*, and *Companies Clauses Act* were incorporated, and the company was empowered, subject to the provisions and powers of deviation contained in this Act, and in the *Railways Clauses Consolidation Act*, to make the railway in the lines and upon the lands delineated in the plans, and described in the books of reference; and it was enacted that, "subject to the provisions in this and the recited Acts contained, it shall be lawful for the company to enter upon, take, and use such of the said lands as may be necessary for the purposes thereof." The time for the completion of the works expired in August, 1861, and no special provision was made as to the time for the sale of superfluous lands. The *Great Western Company* had become entitled to the undertaking authorized by this Act.

The whole land purchased from the Plaintiff was a piece of six perches, and formed the western corner of a field belonging to the Plaintiff, which was bounded on the north-west, south-west, and south-east sides by land of the *Clerkenwell Charity Trustees*. The railway ran north and south on an embankment, the line of rails lying a little to the west of the western corner of the field. It was intended when the six perches were taken to construct the embank-

ment over the whole of them, but by a change of level the embankment was made narrower, and occupied only a portion at the extreme corner, leaving unoccupied a strip along the eastern side of the purchased piece.

The railway and its embankment completely severed the land of the *Clerkenwell Trustees* lying east of the line, and adjoining the north-west side of the above-mentioned field of the Plaintiff, from their land lying east of the line, and adjoining the south-west and south-east sides of the field. On the occasion of the purchase from the *Clerkenwell Trustees* of the land required from them for the construction of this part of the railway, the company therefore agreed to give them, as part of the accommodation works to which they were entitled, an occupation road over the eastern part of the six perches of land, so as to remedy the above severance, and they made the above alteration of level for the purpose of leaving a strip for the road.

Upon this occupation road being made, the Plaintiff, having discovered the arrangement which had been entered into, filed his bill insisting that the company by thus dedicating the strip of land in question to the purposes of an occupation road had shewn it to be land not required for the purposes of the railway, and that the Plaintiff was entitled to re-purchase it as superfluous land. Vice-Chancellor *Stuart* made a decree in the Plaintiff's favour.

Mr. *Bacon*, Q.C. (Mr. *T. Stevens* with him), for the company, in support of the appeal, referred to *Lord Carington* v. *Wycombe Railway Company* (1); *Astley* v. *Manchester, Sheffield, &c., Railway Company* (2); *York and North Midland Railway Company* v. *Milner* (3); *Rangeley* v. *Midland Railway Company* (4).

Mr. *Walford*, for the Plaintiff, in support of the decree, referred to *Simpson* v. *South Staffordshire Waterworks Company* (5); *Reg.* v. *Wycombe Railway Company* (6); *Flower* v. *London, Brighton, and South Coast Railway Company* (7).

(1) Law Rep. 3 Ch. 377.
(2) 2 De G. & J. 453.
(3) 3 Railw. Cas. 773.
(4) Law Rep. 3 Ch. 306.
(5) 11 Jur. (N.S.) 453.
(6) Law Rep. 2 Q. B. 310.
(7) 2 Dr. & Sm. 330.

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SIR W. PAGE WOOD, L.J.:—

We are of opinion that this bill ought to have been dismissed. In the first place, the question is not simply whether the company, having bought land from one person, and being under an obligation to find him a passage between two portions of his remaining land, which had been severed by the purchase, can take compulsorily, under the powers of the Act, the land of a third party for the purpose of providing that accommodation. The case is not of that simple nature. A small piece of land was bought from the Plaintiff for the purpose of making an embankment upon which the railway was to run, the lines of rail being upon land of the *Clerkenwell Trustees*, and if the embankment had been constructed according to the original design, the whole of that small piece of land would have been *bonâ fide* wanted for that embankment. But the embankment having the effect of completely stopping the passage between the northern and southern portions of the land of the *Clerkenwell Charity Trustees*, lying on the east of the railway, those trustees have a right under the Act to compel the company to make for them a communication between those portions. The company then find that having bought the land of Lord *Beauchamp bonâ fide*, with a view to the ordinary construction of the railway, they can, by altering the level of their line, make the embankment narrower, so as to leave unoccupied a portion of the ground bought from the Plaintiff, and make over it a communication such as is required by the *Clerkenwell Trustees*. It would be rather a strong thing to say that when the land had been properly taken for the purpose of making the embankment, a small portion of it could not afterwards be appropriated to make the communication which the company were bound to make for the *Clerkenwell Trustees*.

I think, however, that the case may be put upon a higher ground, if we look to the whole scope of the special Act and the general Acts incorporated with it. By the special Act the company is incorporated "for the purpose of making and maintaining the railways hereinafter described, with all proper works and conveniences belonging thereto, according to the provisions of this Act, and the Acts incorporated therewith." Those Acts are the *Lands Clauses Consolidation Act*, the *Railways Clauses Consolida-*

tion Act, and the *Companies Clauses Consolidation Act*. If we then turn to the 19th section of the special Act for the purpose of seeing what the powers of the company are, we find that "subject to the provisions and powers of deviation in this and the *Railways Clauses Consolidation Act*, 1845, contained, the said railway and branches shall be made in the lines and upon the lands delineated upon the said plans, and described in the said books of reference, and according to the levels defined on the said sections, and, subject to he provisions in this and the recited Acts contained, it shall be lawful for the company to enter upon, take, and use such of the lands as may be necessary for the purposes thereof." It makes no difference whether we read "thereof" as referring to the company or to the Acts.

20 LTD 334

What duties, then, are imposed upon the company by the general Acts? Those Acts give certain powers to the company for the purpose of making the railway and works connected therewith, and they impose upon the company certain duties and obligations. The 16th section of the *Railways Clauses Consolidation Act*, which governed the cases of *Rangeley* v. *Midland Railway Company* (1), and *Reg.* v. *Wycombe Railway Company* (2), is not the section applicable to the particular case before us. The section applicable to the present case is the 68th section of the *Railways Clauses Act*, which makes it obligatory on the company to make communications for the accommodation of persons whose lands have been severed by the railway. [His Lordship read the clause as to "gates, bridges," &c.] Now a case might well occur which would not be very different from what has occurred here—the case of two fields on the eastern side of the railway, being the whole property of the landowner, and having their only communication over a narrow strip of land running north and south, and of the company taking this strip for the purposes of their Act, so as entirely to block up the communication; the company then would be compelled to find accommodation for the owner, and if they could not acquire the land of a third person for the purpose of affecting the communication, they might be brought to a standstill, or obliged at great expense to make an inconvenient communication by means of archways passing under the line. Would

(1) Law Rep. 3 Ch. 306. (2) Law Rep. 2 Q. B. 310.

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that be a reasonable construction of the Acts? It was argued that if the company could take Lord *Beauchamp's* land for the purpose of a communication between the severed lands of another landowner, they would be enabled to cut Lord *Beauchamp's* land in two by making a communication through the middle of it, and that this unreasonable result shews, by *reductio ad absurdum*, that such a power cannot exist. The answer to that is, that though the company while acting *bonâ fide* are the sole judges what land they require for the purposes of their works, the Court can interfere when it sees *mala fides*, and the making the communication in the way suggested clearly would not be *bonâ fide*.

Then the question is, whether the making accommodation works which the company are compelled to make is one of the purposes of their Acts? I take it that whatever they are compellable to do is a plain purpose of their Act, though it may be well argued it is not a purpose of the Act to do for their own accommodation anything which they are not compellable to do, and, accordingly, though the 45th section of the *Railways Clauses Consolidation Act* gives power to purchase land for extraordinary purposes, it does not give the company power to take it compulsorily, the acquisition of land for those extraordinary purposes not being essential to the undertaking.

Mr. *Walford* put another point, which is not unworthy of notice. He referred to sect. 70 of the *Railways Clauses Consolidation Act*, which provides, that if the company does not make the requisite accommodation works the owner himself may make them; and he argues, that therefore the works cannot be intended to be constructed on the land of third parties, because the owner could not enter on the land of a third party to make the works. But I apprehend that the owner might say to the company, "You tell me that it is impossible to make a communication between the severed portions of my property, except by an extremely inconvenient way which you offer me. My answer is, there is a piece of land close by the railway which would make a convenient communication; the *Railways Clauses Act* says you shall make it either over, or under, or by the side of, or leading to or from the railway, you can acquire this piece of land for this purpose, so acquire it, and make me a proper communication." This seems to agree with

the view of the present Lord Chancellor and my learned brother in *Rangeley* v. *Midland Railway Company* (1), where the Court held that the forming a new public footpath in substitution for an old one was one of the purposes of the railway and works, such substitution being a proceeding authorized by the 16th section of the *Railways Clauses Act*, and that the company, therefore, could purchase land for the purpose. So here, we think that it is a purpose of the Acts to do anything which, by the 68th section, the company are compellable to do, and tha they can purchase land compulsorily for that purpose.

We did not hear Mr. *Walford* on the question whether the suit was premature, because it was decided in *Rangeley* v. *Midland Railway Company* that the landowner may come to the Court as soon as the railway company have clearly shewn that the property is not wanted for the purposes of the Act, though the period referred to in sect. 127 of the *Lands Clauses Act* may not have expired. The most conclusive way in which the company can shew this is by selling the land; and accordingly it was held in that case, that the landowner might come as soon as the company had sold the land in question to somebody else. So here, if the making the road had not been a purpose of the railway, the company would have shewn, by dedicating the land to that purpose, that it was not wanted for the purposes of their Acts, and the land would have been permanently spoiled by the operation. In such a case the landowner need not wait till the expiration of the period after which the company must proceed to sell superfluous lands. As, however, we consider that the making the road in question was one of the purposes of the Acts, the bill must be dismissed with costs.

SIR C. J. SELWYN, L.J.:—

I am of the same opinion. The first and main question is, whether the powers given to the company of taking land are limited to such lands as are necessary for the purposes of the railway itself, which appears to have been the view taken by the Vice-Chancellor. Now that these powers are not so limited is decided by *Rangeley* v. *Midland Railway Company*, which establishes that

(1) Law Rep. 3 Ch. 306.

L. JJ. 1868 LORD BEAUCHAMP v. GREAT WESTERN RAILWAY CO.

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land may be taken for the purpose of placing on it a substituted highway for the accommodation of the public. But there remains the question, whether the same reasons apply to the accommodation required for private purposes; and it has been argued before us, not only that the company have no power to take compulsorily any land for any such private purpose, but that when land has been purchased and conveyed to the company, it cannot be lawfully retained or permanently applied for such a purpose. The question, then, is, whether the Acts of Parliament make any such distinction between public and private accommodation. I think not, for the 16th section of the *Railways Clauses Act* appears to class all accommodation works together, as standing on the same footing. The only remaining question, then, is the question of fact, whether the work which is here proposed, and which is actually made, is an accommodation work connected with the railway? A glance at the plan and the bill itself, I think, shews that this is an accommodation work of a proper and reasonable character, and immediately connected with the railway. Therefore on that part of the case I think the Plaintiff wholly fails.

It is unnecessary to add anything with regard to the contention that the suit is premature, the case of *Rangeley* v. *Midland Railway Company* (1) being conclusive on that point. The arguments of the Appellants on this head are inconsistent with themselves, because, if the company have, for a valuable consideration, agreed permanently to give to the charity trustees a road over this land, the equitable estate, so far as is necessary for the permanent user of that road, is vested in the charity trustees. Therefore the company, if they are wrong in the other point, have sold the permanent interest in the land to a stranger, and this Lord *Beauchamp* is entitled to come at once to prevent, as interfering with his right of pre-emption. As, however, we are of opinion that this land is being used for one of the purposes of the undertaking, there is no right of pre-emption in the Plaintiff, and therefore I agree that this bill must be dismissed with costs.

Solicitors: Messrs. *Walford;* Messrs. *Young, Maples, Teesdale, & Nelson.*

(1) Law Rep. 3 Ch. 306.

In re BARNED'S BANKING COMPANY. *Ex parte* STEPHENS.

L. JJ.
1868
July 31.

Bill of Exchange—Acceptor guaranteed by a Third Party—Equity of Holder of the Bill to have the Benefit of the Guarantee.

M. drew bills upon the *B. & A.* company; and a banking company, under an agreement with *M.*, guaranteed the acceptors (also a company) that they would supply them with funds to meet the bills. *S.* discounted the bills, being informed by *M.* of the guarantee of the banking company, but he gave no notice to the banking company or to the acceptors. Afterwards the banking company and the acceptors suspended payment and were wound up. *M.* also executed a deed of composition with his creditors:—

Held (affirming the decision of the Master of the Rolls), that *S.* had no equity to rank as a creditor of the banking company in respect of the guarantee.

Inman v. *Clare* (1), and *In re Agra and Masterman's Bank* (2), distinguished.

THIS was an appeal from an order of the Master of the Rolls made in the winding up of *Barned's Banking Company, Limited.*

The application was made by *Thomas Stephens,* the holder of two bills of exchange drawn by *T. M. Mackay & Co.* and accepted by the *British and American Steam Navigation Company,* to rank as creditors of *Barned's Banking Company* by virtue of a guarantee given by *Barned's Banking Company* to the *British and American Steam Navigation Company.*

In April, 1865, *James Baines & Co.,* of *Liverpool,* were desirous of raising £40,000, and entered into an arrangement with *Barned's Banking Company* that *Baines & Co.,* or their *London* firm, *T. M. Mackay & Co.,* should draw upon the *British and American Steam Navigation Company* to that amount, and that the last-mentioned company should be secured by a mortgage of the *Great Victoria* steam-ship and by a guarantee of *Barned's Banking Company.*

A guarantee was accordingly given by *Barned's Banking Company* to the *British and American Company* in the following form:—

"In consideration of your agreeing to make Messrs. *James Baines*

(1) Joh. 769. (2) Law Rep. 2 Ch. 391.

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& Co. an advance by your acceptances at six months for £40,000, renewable at their option for a further period of six months upon the security of the screw steam-ship *Great Victoria*, we guarantee that they shall keep you out of cash advance, and further that they shall, at least seven days before the bills fall due, provide you with funds to retire the same; and we further guarantee the due payment at maturity by *J. Baines & Co.* of the said bills, or the renewals thereof if renewed."

Bills to the amount agreed on were accordingly drawn, some by *Baines & Co.*, and others by *Mackay & Co.* their *London* firm, and were from time to time renewed. On each occasion of renewal *Barned's Banking Company* renewed the guarantee. The renewal was in the following form:—

"In consideration of your accepting the following drafts, viz., &c., the same being on account of the security held by you on the screw steam-ship *Great Victoria*, we undertake to provide you with funds to retire the said bills at least seven days before maturity thereof."

Two of these renewed bills, drawn by *Mackay & Co.* for £1500 and £2500, were discounted by *T. Stephens*. Mr. *T. M. Mackay* stated in his affidavit that at the time when the bills were discounted he informed *T. Stephens* that the payments of the original bills and renewals was guaranteed by *Barned's Banking Company*.

An order for winding up *Barned's Banking Company* was made on the 8th of May, 1866.

The two firms of *Baines & Co.* and *Mackay & Co.* also suspended payment in 1866, and were being wound up under deeds of inspection. The *British and American Steam Navigation Company* was also being wound up voluntarily, subject to the supervision of the Court.

The steam-ship *Great Victoria* was sold, and the net proceeds amounting to £11,272, were divided among the bill-holders rateably. The bill-holders were admitted to prove for the balance against the estates of the *British and American Company*, and of the firms of *Baines & Co.* and *Mackay & Co.*, but had received no dividend. Under these circumstances *T. Stephens* claimed to prove

against *Barned's Banking Company* under their guarantee. The application was refused by the Master of the Rolls: and *T. Stephens* appealed from this decision.

Mr. *Jessel*, Q.C., and Mr. *W. F. Robinson*, for the Appellant:—

The Appellant is entitled to the benefit of the guarantee. It is true there was no written assignment of the drawers' rights; but what took place amounted to a verbal assignment to the Appellant. He was informed of the guarantee by the drawers when he discounted the bills, and he discounted them on the faith of that security. In fact it is clear from the whole transaction that the guarantee was given in order to assist the drawers in negotiating the bills. Supposing that the *British and American Company* had actually received the money to meet the bills—and for anything we know they have received it—could they have refused to pay to the bill-holders? *Inman* v. *Clare* (1); *In re Agra and Masterman's Bank* (2); *Powles* v. *Hargreaves* (3).

Mr. *Cotton*, Q.C., and Mr. *Kekewich*, for the official liquidator, were not called on.

SIR W. PAGE WOOD, L.J.:—

We have had this question so very recently before us, and the matter was then so fully argued, that we do not feel it needful to take any time to consider our conclusion in the present case. The difference between this case and that of *Inman* v. *Clare* is very clear. In the present case a person holds bills which were drawn in this manner:—*A.* draws on *B.*, and *B.* has a guarantee from *C.* that funds shall be supplied to take up the bills. It is said the guarantee was given for the very purpose of getting these bills discounted, but it is not shewn that the Appellant who discounted the bills had any communication with *Barned's Banking Company* or with the *British and American Company* in any way fixing either of those parties with the knowledge of the dealings between him and the drawer for whom he discounted the bills. Then it is said that the drawer who gets the bills discounted, and has the advantage of this

(1) Joh. 769. (2) Law Rep. 2 Ch. 391.
(3) 3 D. M. & G. 430.

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guarantee, by telling another that such a guarantee exists, and raising money on the faith of that, does the same thing as if he assigned the benefit of the guarantee. But the case does not stand in that position, because it is not *Mackay*, the drawer of the bill, that has this right against *Barned's Bank*, but it is the acceptors, the *British and American Company*, that have the right. The acceptors are not dealing with this gentleman, and trying to induce him to discount bills for their friends, but the drawer who gets the money says: "I have bills drawn on a good acceptor, and if you do not think that acceptor is good he is backed by somebody else." The question is, does that transfer the right which the acceptor has to somebody else? Does it make the discounter of the bill a creditor of the company who has agreed to hold the acceptor harmless? It is clear that cannot be so. This case therefore does not approximate in any way to *Inman* v. *Clare* (1), and it is not attempted to put it upon any such equity as existed in *Ex parte Waring* (2). It appears, moreover, from the affidavit of the official liquidator, that there are other transactions between *Barned's Banking Company* and the *British and American Company* which may very possibly prevent the *British and American Company* from claiming anything from the *Banking Company;* because it may be contended by the *Banking Company* that on the balance of accounts it might appear that they are discharged from all their liability to the *British and American Company* as regards these acceptances, and the holder of the bills, who has neither communicated with one company nor the other, has no right to interfere in any way with the arrangements between them. Even if he had taken an assignment from the drawer of all such rights as he had, he must have given notice of that assignment to the acceptors and to *Barned's Banking Company* before he could alter the position of those two parties. Therefore the very thing that seemed to me to give the right in *Inman* v. *Clare* is wanting here.

The other case cited was that of the *Agra and Masterman's Bank* (3), which was this:—The *Agra Bank* gave a letter of credit in which they said: "You may draw to a certain extent, and whatever bills you draw to that extent we will honour." I found a

(1) Joh. 769. (2) 19 Ves. 345.
(3) Law Rep. 2 Ch. 391.

difficulty in that case in arriving at a contract between the acceptor of a bill upon the faith of the letter of credit and the person who gave the letter. The Lords Justices held, and I was very glad they did so, that the letter was given for the express purpose of being exhibited to all the world, and that all the world was therefore invited to trust the representations of the persons who had given the letter, and therefore those persons were held bound. But there is nothing of that kind here. There is nothing on the face of the bills to shew that any such guarantee as that existed. If anybody knew it at all, it could only be by a conversation between the drawer and the persons who discounted the bills, and the effect of that conversation cannot be fixed upon the *Banking Company* and the *British and American Company*, without the slightest intimation having been given to them of the conversation having taken place. If the money had been paid to the *British and American Company* it might have been a different thing. Then the bill-holder might have raised an equity, but even then he could not raise it till he had given the persons who gave the guarantee notice of his claim, and until that time they might deal with all the rights as between them and the acceptors in any way they thought fit. I think the Appellant's case entirely fails.

4 Ch 429

SIR C. J. SELWYN, L.J.:—

I am of the same opinion, and I think the motion must be refused with costs.

Solicitors for the Appellant: Messrs. *Cotterill & Sons.*
Solicitors for the Official Liquidator: Messrs. *Freshfields.*

L. JJ.
1868
June 11.

In re GENERAL ESTATES COMPANY. *Ex parte* CITY BANK.

Company—Assignment of Chose in Action—Debenture payable to Order—Negotiable Instruments.

The articles of association of a company contained no provisions as to the issue of negotiable instruments, but the objects of the company were such that a power to issue them was to be implied. The directors gave to *H.* for value an instrument under the seal of the company, headed "debenture," and stamped as a deed, by which the company "undertake to pay to the order of *J. H.*, on 1st July, 1867," £1000, with interest half-yearly, on presentation of the annexed interest warrants:—

Held (reversing the decision of the Master of the Rolls), that the indorsee and transferee for value of this instrument was entitled to prove on it against the company free from equities between *H.* and the company.

Per Wood, L.J., *semble* the instrument was a promissory note, but, if not, the company were bound by their promise, publicly held out by the instrument, that they would pay to the order of *H.*, and could not set up against a transferee equities between themselves and *H.*

Per Selwyn, L.J., the instrument was a promissory note.

THIS was a motion by the *City Bank*, by way of appeal from an order of the Master of the Rolls admitting them to prove on certain instruments, subject to any equities existing between the original holder and the *General Estates Company, Limited.*

The objects of the company, as stated in the memorandum of association, were "to acquire by purchase, lease, or otherwise, freehold, copyhold, leasehold, and other real property, for building thereon, improving, letting, or selling, and the doing of all such other things as are incidental or conducive to the attainment of the above objects."

The articles contained the following provisions:—

"83. Every deed or other instrument to which the seal is required to be affixed, shall be signed by two directors and countersigned by the secretary.

"84. The directors shall have power from time to time to raise upon the security of that portion of the capital of the company not called up, and the other assets of the company, real or personal, and for the purposes of its business, any sum of money not exceed-

ing two-thirds of the subscribed capital of the company by debentures, and to pay off such or any of such debentures out of the assets of the company; and again, from time to time, borrow money on debentures, but so that the debt secured by debentures shall at no period exceed in the aggregate two-thirds of the subscribed capital of the company. Such debentures shall carry interest at such rate as the directors shall determine, and interest coupons may be attached to the debentures made payable half-yearly at the company's bankers in *London*.

"85. That the directors shall, and they are hereby empowered to, purchase, take on lease for years, or terms of years determinable on the dropping of any life or lives, or for any other estate or interest, or hire or contract for, on account of and for the purposes of this company, (with power to alter, rescind, vary, or abandon any such purchase or contract,) any messuages, lands, tenements, or hereditaments, which by the nature of the business of the company may be required; and to build, rebuild, alter, repair, or pull down any erections or buildings on any property of the company, and to enter into all contracts which they may deem advisable for any of the purposes aforesaid.

"86. The directors shall have power to sell or exchange any of the property of the company at such times and in such manner, and either with or without any conditions as to the evidence of title, or otherwise, as they may think fit; and to enter into all contracts for the purposes aforesaid, and to rescind, abandon, alter, or vary all or any such contracts; and to raise any sum or sums of money on mortgage of the property of the company, or any part thereof, either by way of mortgage upon, or for a term of years or otherwise, and either with or without power of sale, and upon such terms as to redemption as the directors may deem fit; and shall have power out of the assets of the said company to redeem all, or any, or any part of such mortgages as they may think fit; and that the directors shall have power to grant any lease or leases of the property of the company for any terms of years, or for a less period, either at rack rent or for building thereon, or for improvement thereof, and either with or without taking a fine for the same, and shall have power to advance any sum or sums of money on mortgage or other security; and to enter into agreements to grant such

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leases, and generally shall have power to manage and deal with the property of the company as the directors in their judgment shall deem most advantageous for the purposes of the company."

Nothing was said in the articles as to negotiable instruments, nor as to the mode of executing instruments not under seal, except cheques on the company's bankers.

All the instruments to which the appeal related were in the same form as the following:—

"*The General Estates Company, Limited.*
"*Lombard House, George Yard, London, E.C.*
"No. 1 A. Debenture. £1000."

In consideration of the sum of £1000 paid to them by *J. C. Hodges*, Esq., the *General Estates Company, Limited*, hereby undertake to pay to the order of the said *J. C. Hodges*, Esq., on 1st July, 1867, the said sum of £1000, with interest thereon, after the rate of £5 per cent. per annum, half-yearly, on the 1st day of January and the 1st day of July in each year, on presentation of the annexed interest warrants.

"Given under the common seal of the *General Estates Company, Limited*, this 5th of December, 1865."

This instrument was under the seal of the company, signed by two directors, and countersigned by the secretary, and was impressed with a common £1 5*s.* stamp not bearing a designation appropriating it to any particular class of instrument. Annexed to the instrument were interest warrants, of which the following is a sample:—

"*The General Estates Company, Limited.*
"Interest Warrant, No. 1 A.

"£25 payable 1st July, 1867 (subject to income tax) on presentation at the *National Bank, Old Broad Street.*
"£25. *C. W. Carpenter*, Secretary."

Hodges had sold land to the company and received payment, partly in cash, partly in bills of exchange, and partly in debentures which, by their terms, were expressly made charges on the property of the company. Subsequently, in order to facilitate a proposed mortgage by the company, he gave up the debentures

and received in exchange the instruments the form of which is set out above. On the 6th of December, 1865, *Hodges* sold three of these instruments to *Charles Herman*, and indorsed them to him, also executing a transfer by deed, which, on the 16th, was carried in by *Herman* for registration, and he received a certificate that the transfer had been registered. *Herman* deposited the instruments for value with the *City Bank*.

The Master of the Rolls held that the case was governed by *In re Natal Investment Company* (1), and made the order appealed from.

Mr. *Swanston*, Q.C., and Mr. *J. W. Chitty*, for the Appellant:—

This case is governed by *In re Agra and Masterman's Bank* (2), and *In re Blakely Ordnance Company* (3), and is distinct from the *Natal Investment Company*. The instruments are, in fact, promissory notes. The stamp not being appropriated to any other instrument will serve for a promissory note. The directors in a company constituted like this can issue negotiable instruments: *In re Peruvian Railways Company* (4). The instrument does not cease to be a promissory note by being under seal, the promisor being a corporation: *Halford* v. *Cameron's Coalbrook, &c., Railway Company* (5).

Mr. *Roxburgh*, Q.C., and Mr. *Edmund James*, for the official liquidator:—

This is not a promissory note but a bond, an engagement under seal to pay a sum of money. Nobody would dream of calling it a promissory note but for the words "to the order of," and those words are virtually the same as the words "the holder hereof," in *In re Natal Investment Company*, which case governs the present, and the assignee takes subject to all equities.

Mr. *Swanston*, in reply.

SIR W. PAGE WOOD, L.J.:—

I incline to think that this instrument is a promissory note; but if not, I think it is an instrument coming within the principles of *In*

(1) Law Rep. 3 Ch. 355.
(2) Ibid. 2 Ch. 391.
(3) Law Rep. 3 Ch. 154.
(4) Ibid. 2 Ch. 617.
(5) 16 Q. B. 442.

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re Agra and Masterman's Bank (1) and *In re Blakely Ordnance Company* (2). The case is stronger in favour of the assignee than in either of those cases, for each of these instruments is more like a promissory note than anything else. Its being stamped with a deed stamp cannot affect the question, there being nothing to prevent a promissory note being so stamped. It is under seal, but so, in the absence of special powers, must every instrument be which is executed by a corporation. If there had been in these articles any provision, such as we often find, providing for the issuing negotiable instruments not under seal, the argument from the use of a seal would have had much more weight. The instrument is called on the face of it a debenture, which, so far as it goes, is in favour of its being a deed, and not a promissory note; but when we look at its contents we find that the company thereby undertake to pay to the order of *Hodges*, on the 1st of July, 1867, the sum of £1000, with interest at the rate of £5 per cent. per annum, which, apart from the immaterial substitution of "undertake" for "promise," is the simple and ordinary form of a promissory note. Corporate bodies may issue promissory notes and bills of exchange, where the nature and character of their business warrants it. Here the nature and character of the business is such that the issuing negotiable instruments would be an ordinary and almost necessary incident to it. The better opinion seems to me to be that this is a promissory note, but if it be not so, the authorities go to this, that where there is a distinct promise held out by a company, informing all the world that they will pay to the order of the person named, it is not competent for that company afterwards to set up equities of their own and say that because the person who makes the order is indebted to them they will not pay.

11 Ec. 495. 86 B. 382.

As regards the *Natal Company's Case* (3), I do not think that the Lord Chancellor there overruled the other cases. In that case there was an agreement to pay to a certain individual, "his executors, administrators, or transferees," which his Lordship held equivalent to "his executors, administrators, or assigns." Thus far, therefore, the instrument was in the form of an ordinary money bond, but there were the added words "or to the holder for the time being of

(1) Law Rep. 2 Ch. 391. (2) Law Rep. 3 Ch. 154.
(3) Law Rep. 3 Ch. 355.

this debenture bond," and the Lord Chancellor said those words were not intended to control the general character of the instrument, but were only intended to dispense with the necessity of executing a formal assignment by deed. There the instrument was in other respects in the ordinary form of a covenant to pay, while here it is in the form of a promissory note payable to order.

SIR C. J. SELWYN, L.J.:—

I also think that in this case the company clearly had power to issue negotiable instruments, especially having regard to the 86th clause of the articles. It then remains to be seen whether, according to its true construction, this is a negotiable instrument. The case seems to be stronger than that of *Agra and Masterman's Bank* (1), because there there was a letter of credit which was capable of being put an end to at any time; but in the present case these instruments were finally issued by way of a cash payment. From the nature of the transaction it is to be inferred that it was intended to give negotiable instruments, for they were given in substitution for mortgages, and their being negotiable appears to be the only consideration for the exchange. Then as to their being under the seal of the company, in the absence of any special power an instrument under seal is the only instrument by which a corporate body can contract at all. The present case is broadly distinguishable from that of the *Natal Company*, on the grounds mentioned by the Lord Justice. I think, therefore, that these must be treated as negotiable instruments, and that the order of the Master of the Rolls must be varied by striking out the words making the proof subject to equities.

Solicitors: Messrs. *Linklaters, Hackwood, & Addison;* Messrs. *Treherne & Wolferstan.*

(1) Law Rep. 2 Ch. 391.

L. JJ.
1868
July 20.

SHEPHERD *v.* GILLESPIE.

Sale of Shares—Substituting another Person's Name as Transferee—Acquiescence of Transferee.

The Plaintiff sold shares in a company, through a broker, to *W.*, who was the managing director of the company. On the settling-day the broker, by *W.*'s instructions, gave the name of *G.* as the real purchaser, and the transfers were made out to *G.* and sent to him. *W.* also passed a cheque on the company's bankers for the amount of the purchase-money to the debit of *G.*, and informed *G.* what he had done. *G.* refused to execute the transfers, but did not inform the Plaintiff, or return the transfers, but retained them till the company was wound up, and then handed them to the secretary as a security for the money carried to his debit:—

Held (affirming the decree of *Stuart*, V.C.), that the Defendant *G.* was precluded by his conduct from denying that he was the purchaser of the shares, and that he was bound to indemnify the Plaintiff against the calls, and to pay the costs of the Plaintiff and *W.*

THIS was an appeal from a decision of Vice-Chancellor *Stuart* (1).

The facts were as follows:—

The Plaintiff, *James Shepherd*, a stock and share broker in the *City*, being possessed of 250 shares in the *Joint Stock Discount Company, Limited*, on the 27th of December, 1865, entered into a contract with Mr. *Lloyd*, an agent and share broker, for the sale to him of 200 of the shares for £1750, and of the remaining fifty for £437 10*s.* On the 15th of January, 1866, *Lloyd* paid these sums to the Plaintiff, and informed him that his principal was the Defendant *James Freeling Wilkinson*, who was the managing director of the company, but that by his direction the transfers were to be made out not to him, but to the Defendant *Gillespie* (a director of the company), who was to be treated as the purchaser; and in pursuance of a request to that effect two deeds of transfer, duly executed by the Plaintiff in the form prescribed by the articles of association, were, on the 16th of January, 1866, made to the Defendant *Gillespie*, and delivered by *Lloyd* to an agent of the Defendants. They were subsequently handed over to *Gillespie* for execution by him, but he refused to execute them. He did not, however, offer to return the transfers to the Plaintiff, nor make any statement to him upon

(1) Law Rep. 5 Eq. 293.

the subject. On the 19th of February the Plaintiff wrote to *Gillespie* expressing his surprise that the transfers were not registered, and he subsequently made several other applications to him to register them, but although *Gillespie*, in reply, informed the Plaintiff that his name had been used without his authority, he did not explain the circumstances to him, nor return the transfers, but retained them in his hands until the 17th of March, 1866, on which day an order was made for winding up the company, when he handed them over to the secretary of the company as security for the purchase-money which *Wilkinson* had caused to be debited to him. The bill, which was filed after the winding-up order, charged that the Defendant *Gillespie* had by his acquiescence led the Plaintiff to believe that he had no objection to the transfers, and that the same would be registered.

The Plaintiff prayed for specific performance against both the Defendants, *Gillespie* and *Wilkinson*, and that they might be decreed to procure the shares to be registered in the name of the Defendant *Gillespie;* and that both or one of them might be ordered to pay the calls on the shares, and to indemnify the Plaintiff against all calls, and all damages and costs by reason of the non-completion of the contract.

The Defendant *Wilkinson* admitted substantially the statements of the bill, alleging that the purchase-money was paid by or on account of the Defendant *Gillespie*, and submitting that as between them *Gillespie* ought to be deemed the purchaser and transferee of the shares.

The Defendant *Gillespie*, in his answer, stated as follows:—"In or about the middle of the month of January, 1866, the Defendant *Wilkinson* informed me that he had taken the liberty as an old friend of passing my name as transferee of some shares in the *Joint Stock Discount Company, Limited*, which he alleged had been purchased by or for his late son, and I replied that I had quite enough shares in the said company in my name already, and objected to my name being used in the way proposed, or in any other way. The Defendant *Wilkinson* stated to me that his objection to taking the transfers in his own name arose from the position which he occupied as managing director, and I replied that the same objection applied to myself, as I was a director of the company." He

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then denied having given any authority to any person to purchase any shares for him, or to use his name in the matter, and added:—"I was not aware that my name had been used in the matter until I was informed thereof by the Defendant *Wilkinson* at the time and in the manner aforesaid." He then said:—"In the month of January, 1866, but the exact date I cannot set forth, the said Defendant *Wilkinson* gave to me an envelope containing some, and I believe two, deeds of transfer, executed I believe by the Plaintiff, whereby the Plaintiff purported to transfer to me 250 shares in the said company (being, as I presume, the deeds of transfer referred to in the Plaintiff's bill) and requested me to execute the said deeds of transfer, but I say that I repeated my refusal to have anything to do with the matter, and the said Defendant *Wilkinson* then stated that he had passed a cheque on the company's bankers for the amount of the said purchase-money for the said shares to the debit of my firm, and I informed him that such a thing could not be allowed, and that I should continue to object to be mixed up in the transaction, or used words to that effect." Again he said:—"After Defendant *Wilkinson* had handed to me the envelope before mentioned I several times spoke to my co-directors on the subject of the said transaction, and explained to them the circumstances relating thereto, and mentioned in this my answer, and sometime after I personally delivered the said envelope which I had as aforesaid received from the Defendant *Wilkinson*, with, as I believe, the said deeds of transfer therein, without having executed the said deeds, to the secretary of the said company, and told the said secretary that I had nothing to do with the said deeds, and that I had retained them merely as a director of the company because the purchase-money for the said shares had, as I had been informed by the Defendant *Wilkinson*, been procured by the said debit out of the company's funds, and without either the sanction of the said company or of myself."

The Vice-Chancellor made a decree for specific performance against the Defendant *Gillespie*, and directed him to indemnify the Plaintiff against all calls, and to pay the costs of the Plaintiff and *Wilkinson*. *Gillespie* appealed from this decision.

Mr. *Greene*, Q.C., and Mr. *Smart*, for the Appellant, contended

that *Gillespie* had repudiated the contract throughout, and had done nothing to mislead the Plaintiff. The money paid to the Plaintiff was not *Gillespie's*, but the company's, and *Wilkinson* was the person who ought to be made liable for the wrongful act. At any rate, *Gillespie* ought not to pay *Wilkinson's* costs.

They referred to *Shepherd's Case* (1); *Duchess of Kingston's Case* (2); *Picard* v. *Sears* (3).

Mr. *Prendergast*, Q.C., and Mr. *F. V. Hawkins*, for the Defendant *Wilkinson*.

Mr. *Bacon*, Q.C., and Mr. *J. N. Higgins*, for the Plaintiff, were not called on.

SIR W. PAGE WOOD, L.J., after referring to the facts stated above, continued:—

Now, what a strange state of circumstances is this! The Defendant *Gillespie* admits that he was informed beforehand that his name had been handed in as the transferee, and that afterwards the transfers were brought to him with his name filled in as the transferee by the Plaintiff; that he was told at the same time that his friend *Wilkinson* had taken the liberty of drawing a cheque on the company's assets, and debiting him with the amount, and he said, "I shall continue to object to your so doing." But while objecting, he never informed the Plaintiff that he was not the transferee, and did not intend to be the transferee; he talked it over with his co-directors; he kept possession of the shares; he was asked by the Plaintiff to cause the registration to be made, and gave him no answer; he called upon him at his house, and because he did not find him at home he said he would call upon him and explain the transaction; he was written to repeatedly, and his only answer was, "I did not authorize the use of my name." He told the Plaintiff "I have got the shares and I mean to hold them as security for the debt." He took all the advantage that he could take of dealing with them, but there is one thing he would not do, and that is, he would not make himself responsible for them. Now, in the present

(1) Law Rep. 2 Ch. 16. (2) 2 Sm. L. C. 769.
(3) 6 A. & E. 469.

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day everybody knows, and the Defendant must have known, that the transferor of shares desires to get his money for his shares, and that he is desirous to have his name taken off the register. And yet the Defendant keeps the shares in his own name; and then at the time when he finds things somewhat pressing with regard to the state of the company's affairs, he pledges those very shares, which he has no right to do if he is not the rightful owner. They should have been sent back to *Wilkinson* directly. The highest that it can be put in this gentleman's favour is, that he supposed that he was doing his duty as a director; and that he meant to hold the shares as trustee for the company. But as he held the shares without one word of communication with the Plaintiff on the subject, it would be impossible to say that the decree was wrong in holding him liable in respect of them.

I was doubtful, in the first instance, whether or not *Wilkinson* should have his costs; but, on consideration, I do not think we ought to interfere with what has been done.

SIR C. J. SELWYN, L.J.:—

I think that all the difficulties into which the Appellant has been led in this case have been in consequence of an attempt on his part to take upon himself two inconsistent positions. It may happen to any man, though I hope it does not often happen, to have a transfer of shares made in his name without any purchase, or contract for purchase, on his part. It may also happen to him to have his banking account debited with the purchase-money for those shares. But if he intends to take up the position of a perfect stranger to the whole transaction, it is his duty to repudiate them at the very outset, or at all events, not in any degree to endeavour to take any advantage of the property which has been so transferred to him. But instead of that, *Gillespie* takes up another and entirely inconsistent position, and endeavours to deal, and does actually deal, with these shares for the benefit of another body, namely, the directors. He may have owed some duty to his brother directors; he may have had some anxiety with respect to the money with which his account was debited. He may have been desirous of protecting himself, or his brother directors, or the company, in

respect of those transactions. But whatever his motives were, he does actually deal with this property, and after that, I think it is too late for him to say that he is in the position of a mere stranger. I think, therefore, the appeal must be dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Lewis, Munns, Nunn, & Longden.*

Solicitors for the Defendant *Gillespie:* Messrs. *W. & H. P. Sharp.*

Solicitor for the Defendant *Wilkinson:* Mr. *H. F. Holt.*

In re BARNED'S BANKING COMPANY.

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Winding-up—Companies Act, 1862—*Proof by Creditor holding Security.*

When a company is being wound up under the *Companies Act*, 1862, a creditor holding security is entitled to prove for the whole amount that is due to him, and not merely, as in bankruptcy, for the balance remaining due after realizing or valuing his security.

A secured creditor is entitled to prove for the amount due at the time when his claim is sent in, without regard to securities which have been realized by him between the sending in his claim and its being adjudicated upon (1)

THESE appeals involving the same question were heard together.

In re BARNED'S BANKING COMPANY.

THIS was an appeal by the official liquidators from a decision of the Master of the Rolls.

While *Barned's Banking Company, Limited,* was carrying on business, bills of exchange to the amount of £31,264 were accepted for its accommodation by *Kellock & Co.*, to whom the banking company gave their written guarantees to retire these bills at maturity. The bills were drawn against certain vessels mentioned in the

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guarantees, and the guarantees were so framed as to give *Kellock & Co.* a lien on the ships.

All the above bills were current on the 18th of April, 1866, when *Barned's Banking Company* stopped payment, and, with the exception of two (for £2000 and £1000), were current on the 8th of May, 1866, on which day an order for winding-up the company was made. The whole of the bills consequently were taken up by Messrs. *Kellock*, who paid the full amount of them to the holders.

On the 29th of June, 1866, *Kellock & Co.* sent in a claim to the official liquidators to rank as creditors for £31,264. In 1867 they received from the proceeds of some of the ships £9916, and their remaining securities, which had not yet been realized, were of considerable value.

No notice was taken by the liquidators of the claim which had been sent in till May, 1867, when they sent *Kellock & Co.* a notice that the claim had been included in the list of claims carried into the Chambers of the Master of the Rolls, but that it was therein mentioned to be left for adjustment, the right of the claimants to rank as creditors for the whole amount, without deducting their securities, being disputed.

Kellock & Co. afterwards took out a summons that they might be allowed to stand as creditors for the full amount. This summons was adjourned into Court, and ultimately, on the 28th of April, 1868, the Master of the Rolls decided that the right of a creditor holding security was to prove for the full amount of his debt as it stood at the time when the winding-up order was made, deducting all moneys received from his securities before the winding-up order, but not deducting the value of any securities which were then unrealized, though they might have been realized between the date of the winding-up order and his coming in to prove; His Lordship being of opinion that the rule in Chancery, under which a mortgagee is entitled to receive a dividend on the full amount of his debt, and then make the most of his security, provided he does not receive in the whole more than 20s. in the pound, and not the rule in bankruptcy, which only allows a creditor to prove for the balance remaining due after realizing his security, was the rule applicable to winding up.

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THIS was an appeal by the *Alliance Bank* from a decision of Vice-Chancellor *Malins*.

An order for winding-up the *Xeres Wine Shipping Company, Limited*, was made in December, 1864.

On the 2nd of March, 1865, the *Alliance Bank* sent in their claim to prove for £15,638 and interest. This sum as to £9070 arose from the balance of a loan account with interest, and the bank had, by way of security for it, a lien upon certain wines which were in their own possession. The residue, £6568, was due on bills of exchange, against which the bank claimed a lien on certain wines in the possession of the company. The official liquidator not admitting the right of the bank to prove for the full amount, without deducting the value of the securities, sent them notice on the 9th of March to come in and prove their debt on or before the 15th of March, and to attend at the Judge's Chambers on the 20th of March, being the day appointed for adjudicating on the claims. The bank accordingly, on the 15th of March, 1865, filed an affidavit in support of their claim, but the claim was not adjudicated upon till March, 1868.

After the date of the winding-up order the bank received £6134 by selling the wine which was in their own possession. These receipts commenced on the 14th of February, 1865, and ended in January, 1867, but almost wholly took place after the filing of the affidavit of the 15th of March, 1865. The bank in ascertaining the balance of £9070, mentioned above, had given credit for such of these receipts (£85 in all) as had taken place before the filing of the affidavit.

The lien on the wines in the hands of the company was litigated in a suit instituted by the bank for enforcing it. The liquidator sold part of these wines which was in his hands for £2468, and the rest was sold in the suit for £2850, which was in Court in the suit. Out of these sums the bank would have to receive £4322, against their claim of £6568.

In August, 1867, according to the affidavit then filed by the official liquidator, there was due to the bank for principal and interest, after deducting the proceeds of the sales of wine by the

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bank since the 15th of March, 1865, and the £4322, and some other securities, the sum of £3604.

Vice-Chancellor *Malins*, on the 2nd of March, 1868, held that the proof must be governed by the rule in Bankruptcy, and that the bank could only prove for the £3604 (1).

(1) SIR R. MALINS, V.C.:—

In this case I am asked to admit the *Alliance Bank* as creditors, not for the amount now actually due to them, but for the whole amount of their original debt. It is stated on both sides that the point has never been decided, whether the rule applied in this Court to the estate of a deceased person, or to the estate of a living person as administered in Bankruptcy, is applicable to such a case as this, a point which otherwise I should not have thought could possibly have remained open. But although there is no precise decision on that question, I have no doubt that, as a matter of practice, it has been settled hundreds of times by the application of the principle which I intend to apply in this case, namely, the rule in the Court of Bankruptcy.

It is not necessary for me on the present occasion to decide anything with respect to the rule of the Court applicable to the administration of the estates of deceased persons. On the part of the company many authorities were cited, following *Mason* v. *Bogg* (2 My. & Cr. 443), which seemed to assume, if not to decide, that *Greenwood* v. *Taylor* (1 Russ. & My. 185) was no longer the rule of the Court. The opinion of Lord *Cottenham* expressed in *Mason* v. *Bogg* appears to me to have left it undisturbed, and, as far as I am concerned, I shall do the same. I think that Mr. *De Gex* is right when he says that *Greenwood* v. *Taylor* has not been overruled; and I have no hesitation in saying that I entirely agree with the opinion of the Master of the Rolls (Sir *John Leach*) in that case, which, in my opinion, lays down a rule founded on most solid principles of justice—that while all the creditors who have no security stand on an equality, every creditor, *ultrà* his security, shall be in the same position. This rule in Bankruptcy has long been established, and in the case before Sir *John Leach*, it being one for the administration of the estate of a deceased person, the question was, whether a creditor should stand as such for the whole debt, irrespective of his security, or whether he should realize his security and stand a creditor for the balance. Sir *John Leach* lays down a rule which has long appeared to me, and still appears to me, to be a rule founded on solid justice: "The rule of Bankruptcy must be applied here, and the mortgagee cannot be permitted to prove for the full amount of his debt, but only for so much as the mortgaged estate will not extend to pay. The rule is not founded, as has been argued, upon the peculiar jurisdiction in Bankruptcy, but rests upon the general principles of a Court of Equity in the administration of assets. The mortgagee who has two funds, as against the other specialty creditors who have but one fund, must resort first to the mortgage security, and can claim against the common fund only what the mortgaged estate is deficient to pay." That rule has for many years commended itself to my judgment, and it does so still.

But this is not the case of the administration of the estate of a deceased person, but of the winding up of a company; and if it had not been a question

Mr. *Baggallay*, Q.C, Mr. *Cotton*, Q.C., and Mr. *Kekewich*, for the official liquidators of *Barned's Banking Company*, in support of their appeal:—

The rule in bankruptcy ought to be followed, that the creditor must first realize his security, and then prove for the deficiency.

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as to a joint stock company of more than seven members, it is clear that the bank holding this security must have realized their security, and proved for the balance only.

This rule does not depend on any statutory enactment, but on a rule in Bankruptcy, established irrespective of express statutory enactment, and under the statute of *Elizabeth*, which provides:—"Or otherwise to order the same (*i.e.* the assets) to be administered for the due satisfaction and payment of the said creditors, that is to say, for every of the said creditors a portion, rate and rate alike, according to the quantity of his and their debts." The 133rd section of the *Winding-up Act*, which provides that the property of the company shall be applied in satisfaction of its liabilities *pari passu*, and subject thereto shall be distributed among the members of the company according to their rights and interests therein, is important, and is, in effect, the same as the provision in the statute of *Elizabeth*.

Now, what does natural justice require under these circumstances? The *Alliance Bank*, being creditors for £15,000, hold security for £12,000, while many other creditors hold no security whatever. Natural justice clearly requires that those who hold securities shall, in the first place, realize them, because the securities might satisfy their claims. But if not, the proof clearly ought only to be admitted for that which remains uncovered by securities. That is the rule in Bankruptcy; it is extraordinary that the *Winding-up Act* should have been silent on the matter; and I suppose the fact that the question has never arisen before is because nobody has been hardy enough to raise a question which appears to me not to admit of any doubt.

The winding-up is a *quasi* bankruptcy; the official liquidator takes possession of all the assets of the company; he realizes them under the 133rd section, and distributes them rateably, or *pari passu*, among the creditors; but over and above the assets calls may be made on the shareholders. On these grounds I am of opinion that the rules in Bankruptcy are applicable, and therefore that every creditor having a security must realize his security, and come in as a general creditor for the balance due to him after such realization. The winding-up order was made in 1864, and in 1865 the bank realized their securities, and now, in 1868, they ask me to admit them to stand as creditors for the whole amount of their original debt. Now, if the official liquidator had given them a cheque for the amount they realized on their securities, the company would not then have thought of contending that they could stand as creditors for the whole of their original claim, and they have no higher claim to stand as creditors for the whole amount because they realized their securities instead of being paid by the official liquidator.

I must, therefore, come to the conclusion that the bank must be ad-

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This rule is not founded on express statutory enactment, but was adopted as being equitable and in conformity with the principle enunciated by 13 Eliz. c. 7, s. 2, which is the only statutory provision at all bearing upon it. The *Companies Act*, 1862, s. 133, contains similar language, and so, in effect, applies this rule to a voluntary winding-up; and it is absurd to suppose that the rule is to apply under a voluntary winding-up and not under a compulsory one. It is said that the Court of Chancery has adopted a different rule: *Greenwood* v. *Taylor* (1); *Mason* v. *Bogg* (2). But the rule in Chancery is merely a rule as to the administration of the estates of deceased persons, in which various rules exist which certainly do not exist under the *Companies Act*, as the distinction between legal and equitable assets, and between simple contract and specialty debts. The Court ought to apply its general principles, not import its practice adopted in a particular kind of administration. The 158th section of the Act, and General Order, 11th of November, 1862, rules 20—25, support our view, as does the form of affidavit No. 21 in the Schedule to the General Order. The practice in winding up has been to deduct the security, and the understanding of the mercantile community is the same way.

Sir *Roundell Palmer*, Q.C., Mr. *Jessel*, Q.C., and Mr. *Robinson*, appeared for *Kellock & Co.*, but the Court decided to hear before them the Respondent in the case of the *Xeres Company*.

Mr. *De Gex*, Q.C., and Mr. *Marten*, for the official liquidator of the *Xeres Company*:—

The rule in bankruptcy is founded on equitable principles, and ought to be adopted: *Ex parte Worrall* (3). The time at which the amount of the claim is to be ascertained is when the Court

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mitted as creditors for the balance which remains due to them after realizing the securities held by them, and for that amount only.

I am clearly of opinion that the rules in Bankruptcy must be applied (even if they are different from those applicable to the administration of a deceased person's estate in this Court), this being a *quasi* bankruptcy.

The official liquidator tells me that the case has often in practice occurred.

I consider the claim unjustifiable, and the summons must be dismissed with costs.

(1) 1 Russ. & My. 185.

(2) 2 My. & Cr. 443.

(3) 1 Cox, 309.

adjudicates upon it, not the time when the claim is carried in: *Ex parte Maxoudoff* (1); otherwise a creditor might be decided to have a right to prove for £10,000 at a time when he had received £9000 of it.

[The LORD JUSTICE SELWYN referred to *Wright's Case* (2).]

The point was not there raised in argument.

[The LORD JUSTICE SELWYN:—The case seems to indicate what the course of practice has been.]

Where a mortgagee files a bill for administration, he must realize before proving: *Seton* on Decrees (3). The statute 7 & 8 Vict. c. 111, s. 11, imports the law of bankruptcy. The *Winding-up Act*, 1848, s. 74, provided that the rule in bankruptcy should be followed. The Act of 1862 to a great extent re-enacts the Act of 1856, which provided that limited companies should be wound up in the Court of Bankruptcy, so if the creditors here are right a different rule would be applied in the case of limited and unlimited companies. The last Act also gives power to relegate cases to the Court of Bankruptcy. The Legislature must therefore have intended the bankruptcy rule to be followed. The rule in bankruptcy has the advantage of making the interest of a secured creditor identical with that of the general body of creditors. In a mercantile case not exactly falling within a rule of Chancery, the bankruptcy rule will be applied: *Lodge* v. *Prichard* (4).

[*Chapman* v. *Esgar* (5), and *Lindley* on Partnership (6) were also referred to.]

Mr. *Karslake*, Q.C., and Mr. *Eddis*, appeared for the *Alliance Bank*, but counsel for the creditors were not called upon in either case.

SIR W. PAGE WOOD, L.J.:—

We both entertain a very strong opinion with reference to the question whether the rule in Chancery, or the rule in bankruptcy is to be applied in this case. It appears to us that there is nothing

(1) Law Rep. 6 Eq. 582.
(2) 14 Jur. 498.
(3) 3rd Ed. pp. 289-292.
(4) 1 D. J. & S. 610.
(5) 1 Sm. & Giff. 575.
(6) 2nd Ed. p. 1286.

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whatever to displace the force of the observations made by Lord *Cottenham* in *Mason* v. *Bogg* (1), observations which seem to us to be founded on justice, and to have been a very clear and distinct expression of that distinguished Judge's opinion, although it appears that ultimately it was not necessary to decide the question. That opinion seems to have been in accordance with the universal practice in the offices of the Masters up to that time (at all events, no case has been cited to the contrary), and certainly it has been the constant course of practice ever since. The point that there arose was whether a mortgagee coming in to prove under a decree in a creditors' suit by virtue of the covenant contained in the mortgage deed, was obliged, first, to realize his security, and prove only for the balance. *Primâ facie* there would be nothing more unreasonable than to say that he is obliged to do so. I say unreasonable, regard being had to the state of the law. I am not going back to the question whether a mortgagee ought to be allowed to make the most of all his securities. The law, whether well or ill-founded, has been settled, that the bargain of a mortgagee is of this nature: that he has bargained for a covenant which gives him a personal right against his debtor, and that he has bargained also, at law, for an absolute right to the property if the debt be not paid by a given day. Courts of Equity so far interfere with his legal contract as to allow the mortgagor to redeem after the day, but they have interfered no further. They allow the mortgagee to proceed, at one and the same time, with a bill to foreclose, an action on the covenant, and an action of ejectment. They do so upon this principle, that the mortgagee has a right to say, "The bargain by my debtor is that he will pay me, and I am entitled to insist upon that. I have also the pledge in my hands, which no one can take from me without paying me in full, and it is for me to say when I will choose to realize that pledge." The pledge may be of very great value at one time, and not of much value at another time; and the bankruptcy rule prevents the creditor from taking any benefit by his personal demand against the debtor, except on the terms of selling at a time when the property pledged may perhaps not sell for half as much as it would fetch if the creditor could choose his time for realizing it.

(1) 2 My. & Cr. 443.

Now in the case of proceedings with reference to the administration of the estates of deceased persons, Lord *Cottenham* put the point very clearly, and said (1): "A mortgagee has a double security. He has a right to proceed against both, and to make the best he can of both. Why he should be deprived of this right because the debtor dies, and dies insolvent, it is not very easy to see." Mr. *De Gex*, who argued this case very ably, says that the whole case is altered by the insolvency. But where do we find such a rule established, and on what principle can such a rule be founded, as that where a mortgagor is insolvent the contract between him and his mortgagee is to be treated as altered in a way prejudicial to the mortgagee, and that the mortgagee is bound to realize his security before proceeding with his personal demand.

It was strongly pressed upon us, and the argument succeeded before Sir *J. Leach* in *Greenwood* v. *Taylor* (2), that the practice in bankruptcy furnishes a precedent which ought to be followed. But the answer to that is, that this Court is not to depart from its own established practice, and vary the nature of the contract between mortgagor and mortgagee by analogy to a rule which has been adopted by a Court having a peculiar jurisdiction, established for administering the property of traders unable to meet their engagements, which property that Court found it proper and right to distribute in a particular manner, different from the mode in which it would have been dealt with in the Court of Chancery.

Then Mr. *De Gex* referred to *Lodge* v. *Prichard* (3), where the Court of Chancery adopted the rule in bankruptcy as to the administration of joint and separate estates of partners. That rule does not violate any contracts, and has been adopted as being the best mode of dealing practically with a very difficult question. The propriety of the rule is certainly severely tested in such a case as *Lodge* v. *Prichard*, but its adoption in that case does not appear to me to have any application to *Mason* v. *Bogg* (4), which dealt simply with the administration of an individual's estate according to his contracts. I think that the observations of Lord *Cottenham* in *Mason* v. *Bogg* were sound in principle, and they were undoubtedly in accordance with settled practice.

(1) 2 My. & Cr. 448.
(2) 1 Russ. & My. 185.
(3) 1 D. J. & S. 610.
(4) 2 My. & Cr. 443.

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Mr. *De Gex* ingeniously pointed out to us the nature of the decree that is made where a mortgagee with an insufficient security seeks to have the estate of the deceased mortgagor administered by the Court. I apprehend that the reason for the form of such decrees is, that when a mortgagee files a bill of that nature he is not standing on his strict rights as mortgagee, but is asking an indulgence by applying to the Court to help him to realize his security. Whether, even in that case, he ought to be put on such terms, it is not necessary to say; but it is quite settled, I apprehend, that when he comes in to prove his debt in Chambers, not being himself the Plaintiff, he is not put on any such terms, because he only comes in to ask for his strict rights.

Further considerations arise when we examine the Winding-up Acts; but I think that the result of that examination is adverse to the official liquidators. It may, indeed, be said that these companies are in the nature of trading partnerships, and, therefore, that the rule in bankruptcy should be adopted in winding them up, especially as there is a clause in the *Companies Act*, 1862, which says that in a voluntary winding-up equal distribution is to be made amongst creditors; an expression similar to which, in 13 Eliz. c. 7, appears to have led to the establishment of the rule in bankruptcy. But it is important to observe, in the first place, that a winding-up does not necessarily prove the existence of anything analogous to bankruptcy. There have been cases in which a company perfectly solvent, is wound up because there are equities between the partners to be adjusted. One partner may have paid more than all the rest, and that would justify a winding-up, in order that the man who has paid more than he ought may have contributions from his partners. The object of the first *Winding-up Act* was to give a remedy between the contributories as amongst themselves, not to provide any remedy for creditors. A creditor was restrained from proceeding at law until he had come in before the Master and informed the Court of the amount of his claim. When he had done that, he might go on with his proceedings, his claim before the Master being made merely for the sake of giving information to the Court, that it might be able better to work out the equities between the contributories. In the later Acts, no doubt, and especially in the Act of

1862, creditors are placed on a very different footing. But it is to be observed that some of the earlier statutes expressly say that administration is to be according to the course in bankruptcy. I do not refer to this as meaning to say that an enactment that these companies should be wound up according to the course in bankruptcy, or according to the course in Chancery, would be decisive on the present question; but I refer to it as shewing that when the Legislature intended proceedings to be conducted according to the course in bankruptcy, it said so. This observation is in accordance with the view taken by both the Lords Justices in *Smith, Fleming, & Co.'s Case* (1), where it was held that those rules as to set-off, which do not exist except in bankruptcy, were not to be applied under the *Companies Act*, 1862. The Lord Justice *Turner* there says (2): "The right of set-off may, indeed, as was insisted in argument, have subsisted in equity before it was introduced into the law by statute; but no authority was cited in argument, and none, so far as I am aware, can be found, in which the right was ever held to exist in equity in such a case as the present, and set-off in bankruptcy does not, I think, apply. Where the law of bankruptcy was intended to be applied it is specially referred to by the Act. To hold that the right of set-off exists in such a case as the present would, as it seems to me, be, in effect, to alter the contracts between the parties." That is precisely the ground on which I wish to put the present case. We are asked to alter the contract between the parties by depriving the secured creditor of one of his remedies, namely, the right of standing upon his securities until they are redeemed. The only ground alleged for depriving him of this right is the operation of the rule in bankruptcy, and that rule, as it appears to us, would have been extended to this case by the Legislature if it had been intended to apply; whereas the *Companies Act*, 1862, does not contain anything pointing at such a rule as that the creditor is to have his securities realized or valued before he can be admitted to prove.

There remains the question as to the time with reference to which the amount proveable is to be ascertained; and as to this there is a little more difficulty. I think, however, that the true rule is, that the debt is to be taken as it stands at the time when the claim

(1) Law Rep. 1 Ch. 538. 12 Jur. N.S. 806

(2) Law Rep. 1 Ch. 543, 544. 12 Jur. N.S. 807

5 Ch. 20
9 Ec. 719

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is put in. The 20th rule of the General Order under the Act of 1862 directs an advertisement fixing a time for the creditors to send the particulars of their debts or claims to the official liquidator, and appointing a day for the adjudicating thereon. The Court, therefore, is to adjudicate upon the debt or claim so sent in, and the adjudication, at whatever time it may take place, must be on that debt or claim, and I apprehend the only way of adjudicating upon it must be to adjudicate on what was due when the debt or claim was sent in. A variety of things may have taken place in the interval between the adjudication and the sending in the claim. The debt may have been increased; if so, a new claim must be brought in. The Court will only adjudicate on the claim sent in.

I do not think that the time of the creditor's making his affidavit is the time to be referred to. By the 23rd and 24th rules of the General Order, a claim not disputed may be allowed upon the affidavit of the official liquidator; but if the official liquidator disputes it, the adjudication may be adjourned. The creditor then has notice sent him to prove his claim, and must make an affidavit in support of it. It would be an extremely inconvenient rule to take the time of filing this affidavit as the period for determining the debt to be adjudicated on. The inconvenience would be this—that where the demand of the creditor was large, and the securities held by him considerable, the official liquidator might dispute the claim for the very purpose of obliging the creditor to realize some of his securities before the time for making his affidavit arrived. Thus, in the first of the cases now before us, Messrs. *Kellock* (though I do not mean to say from any such motive as I have referred to) had no notice that their claim was disputed until nearly a twelvemonth after it had been sent in. It appears to me that it would be leaving a great deal too much open to the caprice or arbitrary discretion of the liquidator if we were to fix upon any time except the time when the claim which is to be adjudicated upon was sent in. The form of a creditor's affidavit given in the Order no doubt runs: "The above-named company was, at the date of the order for winding up the same, and still is, justly and truly indebted to me in the sum of £ ;" but a form which, according to rule 69, is to be used "with such variations as the circumstances of each case may require," cannot be treated as

deciding a question of this nature. The affidavit by the creditor ought, in my opinion, to have reference to the claim, and to the time at which the claim was sent in.

It seems to us that the decision of the Master of the Rolls ought to be affirmed in the case of *Barned's Banking Company*, and the decision of the Vice-Chancellor overruled in the case of the *Xeres Wine Company*.

SIR C. J. SELWYN, L.J.:—

It has been argued that the case of *Mason* v. *Bogg* (1) is not binding upon this Court, because the observations of Lord *Cottenham* in that case, as has been said, amounted to nothing more than suggestions made for the assistance of counsel during the argument. It appears to me that the well-reasoned opinion of His Lordship amounts to something more than a suggestion made for the assistance of counsel during the argument; but even if it be treated as a mere *dictum*, it derives much additional weight from the undoubted fact that for more than thirty years the practice has been in accordance with it. This, I think, is perfectly indisputable, and it is also indisputable that the practice is inconsistent with the rule and practice established in bankruptcy. Now, in considering the subsequent Acts of Parliament, we must attribute to the Legislature the knowledge of the difference between the existing courses of practice in bankruptcy and in Chancery. If we look at the Acts of Parliament themselves, we shall find abundant traces that this difference was present to the mind of the Legislature. We have, in the first place, been referred to the Act of 1844 (7 & 8 Vict. c. 111, s. 11), whereby it is expressly enacted, "That the law and practice in bankruptcy now in force shall extend, so far as the same may be applicable, to this Act, and to fiats in bankruptcy issued by virtue of this Act, and to all proceedings under such fiats, save and except as may be otherwise directed by this Act." That statute has been expressly repealed by the subsequent Acts. We are next referred to the Act of 1848 (11 & 12 Vict. c. 45). Under sect. 73 of that Act all that the creditor was required to do was to go into the Master's office and

(1) 2 My. & Cr. 443.

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exhibit such proof as he might be able of his debt, and having done so, he was at liberty to proceed to enforce his demand against the company, or its members, without further hindrance or delay, with the single exception that he could not seize the property of the company in the hands of the official manager. In addition to that, sect. 28 contains the proviso, "except as is by this Act expressly provided, nothing in this Act contained, nor any petition or order made under the same for the dissolution and winding up of any company, shall extend or enlarge, diminish, prejudice, or in any wise alter or affect, the rights or remedies of creditors." We come then to the Act of 1862, which although it enables the Court to stay actions and suits by creditors against companies which are being wound up, does not contain any clause calculated to diminish or prejudice the rights of creditors with respect to the securities held by them.

I think, therefore, that the onus is clearly thrown on those persons who come here and say that when the Legislature, with a knowledge of the existence of the difference between the practice in bankruptcy and the practice in Chancery, entrusted the winding up of the companies to the Court of Chancery, and said in express terms that the practice of the Court of Chancery was to prevail, they intended by some implication or inference to diminish, prejudice, or affect the rights of creditors. I can find no trace of any such intention. I think, therefore, we are bound to follow the established practice of the Court of Chancery, especially when we find that that practice has been followed ever since the passing of the *Winding-up Act*, and so long as winding-up orders have been made in the Court of Chancery. We have had the advantage of hearing this case argued by five counsel of great experience and ability, and on the former occasion I put the question which I repeated this morning, whether any one of those counsel ever remembered an instance of the rule in bankruptcy having been extended to the proceedings under a winding-up in Chancery. I think, therefore, it is not too much to say that the rule in bankruptcy has never been applied to the case of the proof of debts under a winding-up in Chancery. If any such rule as the rule in bankruptcy had been applied, we should have had abundant instances given us of it. No case of that kind can be produced,

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and, on the contrary, *Wright's Case* (1), to which I referred during the argument, although it is not a decision on the point, goes a long way to establish the practice of the Court of Chancery as distinguished from that of bankruptcy.

There remains then only the question as to the time with reference to which the amount of debt is to be fixed. We have been pressed with many arguments as to the great inconvenience which would result if we adopted the rule suggested by the Lord Justice; but it appears to me, if we are to consider the matter upon the balance of convenience and inconvenience, it would strongly preponderate in favour of the view which he has enunciated. If we look at the practice established by the General Order, it is entirely within the discretion of the Judge to fix the time within which creditors are to send in particulars of their debts or claims. Of course until that time the debt cannot be established. The creditor is to send in particulars of his debt, and it appears to me perfectly immaterial whether the particulars of the debt are supported by his affidavit or not at that time, for if we say the time is to depend on the filing of the affidavit, the only result would be to encumber the proceedings under these windings-up with the expense of an unnecessary affidavit in every case. An honest man would state the particulars of his debt or claim as it was at the time, and it would rest with the official liquidator to say whether that claim so made by him is to be supported by evidence or not, or whether it is to be admitted at once. I think we have not heard any satisfactory answer to the question upon what principle could the claims of two creditors having debts of exactly the same amount, created at the same time, and having exactly the same security, be placed in a different position because in the one case the official liquidator thought fit to admit the claim, and in the other case said, "I require further proof, and I will have it?" In the second of those cases, is the time to be fixed when the creditor is called on to make the affidavit, or at the time when the case is first put in the paper for hearing, or at the time when the Court ultimately pronounces its judgment?

I think, therefore, that the balance of convenience and inconvenience inclines strongly to the view which my learned brother

(1) 14 Jur. 498.

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has expressed, which is, that the debt is to be taken as it stood when the creditor sent in his claim.

Then it has been said that the General Order fixes another time, and we have been referred to the form of affidavit in the Schedule; but obviously that form is not intended to be used without alteration in cases where circumstances have changed between the winding-up order and the time of making the affidavit. It is merely a form intended to serve as a guide, but to be modified so as to suit the facts of the particular case. It seems to me the time we must consider the material time is the time when the claim is sent in.

Solicitors: Messrs. *Gregory & Co.*; Messrs. *Freshfields*; Messrs. *Crosley & Burn*; Messrs. *Thomas & Hollams.*

L. JJ. 1868 *July* 16.

In re OVEREND, GURNEY, & CO.

BARROW'S CASE.

Winding-up—Contributory—Interest on Calls.

20 Eq 362-8

In the winding up of a company a call was made, and the notice of call required payment of the call by a given day, and stated that if it was not paid by that day interest at £5 per cent. per annum would be charged:—

Held, that the statute 3 & 4 Will. 4, c. 42, was applicable, and that interest at £5 per cent. from the day named in the notice of call up to the time of payment must be paid.

THIS was an appeal by *Barrow*, a contributory of *Overend, Gurney, & Co., Limited*, from an order of Vice-Chancellor *Malins*, who decided that he was liable to pay interest on calls on his shares.

Soon after a resolution of the 11th of June, 1866, for winding up the company had been passed, a large number of shareholders formed an association for the purpose of contesting their liability on the ground of their having been induced by misrepresentation to take their shares. *Barrow* was a member of the association. Under the winding-up a first call of £10 per share was made on the 24th of August, and the notice of call stated that it would be payable on the 15th of September, 1866, required

payment of it into the *Bank of England* by that day to the account of the liquidators, and proceeded: "Should the above call not be paid by the date named, interest will be charged thereon at the rate of £5 per cent. per annum." The liquidators commenced proceedings against some of the contributories for the purpose of enforcing payment. Pending the proceedings in the cases of *Oakes* and *Peek* before the Vice-Chancellor (1), a summons was taken out on behalf of the members of the association that they might be at liberty to pay into Court the amount of their calls, and that upon such payment all proceedings against them for calls might be suspended. On the 21st of December, 1866, an order was made that the proceedings for calls should be stayed, and that the persons named in the schedule (*Barrow* being one) should pay their calls, amounting to £77,000, into the bank to the credit of a separate account to be opened in the names of the liquidators, and to be called "The Account of the Liquidators in respect of the Security of *Adam Thorn* and Others," and to be dealt with as the Court should direct. The amount of *Barrow's* calls was £2000, which he paid to the above account accordingly.

The cases of *Oakes* and *Peek* were carried to the House of Lords, and in August, 1867, the liability of the shareholders was finally established (2). Immediately after this an order was made for carrying over to the general credit of the liquidators the £77,000, and some other moneys subsequently paid in to the security account.

Barrow subsequently paid to the liquidators interest on the £2000 from the 15th of September, 1866, to the 21st of December, 1866, but contended that if interest was payable at all, it ceased on the payment into Court. Vice-Chancellor *Malins*, on a summons by the liquidators, held that the payment of the £77,000 into the bank was not a payment of the calls, but only a deposit by way of security for them, and that subsequent interest at £5 per cent. was payable.

Mr. *Cotton*, Q.C., and Mr. *J. W. Chitty*, for the Appellant:—

No interest is payable. There was no balance order on *Barrow* till after the decision in the House of Lords; and if there had

(1) Law Rep. 3 Eq. 576. (2) Law Rep. 2 H. L. 325.

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been, a balance order is not a judgment: *In re Leeds Banking Company* (1). The case of *Ex parte Lintott* (2) is distinguishable. The case is not governed by the articles of association; we are under the statute only. The liability is a mere statutory liability, which cannot be extended, and the statute says nothing as to interest on calls: *Companies Act*, 1862, ss. 75, 133. *Watney* v. *Wells* (3) furnishes an analogy against payment of interest by force of any provision in the articles as to payment of interest on calls. The statute 3 & 4 Will. 4, c. 42, does not apply. At all events, the payment into Court stops the interest.

Mr. *Cole*, Q.C., and Mr. *Ferrers*, for the liquidators, were not called upon.

SIR W. PAGE WOOD, L.J.:—

We entertain no doubt upon this case. It is against the spirit of the Act that shareholders who do not pay their calls to the day should be placed in a better position than those who do, and who thus provide assets for the payment of the debts of the company. According to ordinary justice interest ought to be paid. The intention of the 75th section of the Act is plain. When a call is made, a time is fixed for the payment, and the Act makes the call a debt—no matter to whom—and it is a debt payable at a fixed time named in the notice of call, which states that after that day interest will be claimed. The case comes within the statute 3 & 4 Will. 4, c. 42, and I can see no reason why interest should not be paid, but every reason why it should. The payment into Court was for the convenience of the contributories who disputed their liability. The payment was to a "security account." It was merely a mode of giving security, and cannot be considered as payment so as to stop interest.

SIR C. J. SELWYN, L.J.:—

I think that this sum is, by the 75th section of the Act, clearly made a debt, and that it is a debt upon which, under the statute 3 & 4 Will. 4, c. 42, interest can be claimed. It is said that

(1) Law Rep. 1 Ch. 150. 12 Jur. N.S. 304 (2) Law Rep. 4 Eq. 184.
(3) Law Rep. 2 Ch. 250.

though it is a debt it is due neither to the official liquidators nor to the company; but the 95th section establishes that it is payable to the official liquidator, for he is the person to take proceedings to recover it. The payment into Court was only by way of security; the money was to remain to the security account until the decision of the House of Lords, and it could not in the meantime be applied in satisfying the debts of the company. Such a payment cannot stop interest. If the money has not been invested so as to produce interest, the only persons to blame are the persons who deposited it, and on whose application the order giving them liberty to pay it into Court was made.

L. JJ. 1868 BARROW'S CASE.

Solicitors for the Official Liquidators: Messrs. *Maynard, Son, & Co.*

Solicitors for the Appellant: Messrs. *Linklaters, Hackwood, & Addison.*

In re UNITED ENGLISH AND SCOTTISH ASSURANCE COMPANY.

Ex parte HAWKINS.

L. JJ. 1868 *July* 28, 29.

Winding-up—Companies Act, 1862, *s.* 100—"*Trustee*"—*Creditor who has obtained payment of Money of the Company under a Garnishee Order.*

A creditor of a joint stock company obtained a garnishee order under the 71st section of the *Common Law Procedure Act*, attaching the money of the company in the hands of their bankers. Subsequently, a Petition for winding up the company was presented; and after the presentation of the Petition, but before the winding-up order, the creditor obtained an order under the *Common Law Procedure Act* for payment of the money, and received it from the bankers. The official liquidator having taken out a summons under the 100th section of the *Companies Act*, 1862, to cause the creditor to refund the money:—

Held (reversing the decision of *Stuart*, V.C.), that the creditor was not a "trustee" within the meaning of the 100th section; and that the Court had no jurisdiction to make the order.

THIS was an appeal from an order of Vice-Chancellor *Stuart*.

In November, 1867, Mr. *H. Hawkins* recovered judgment at law against the *United English and Scottish Assurance Company, Limited*, for the sum of £217 15*s.* 7*d.* On the 17th of December

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he obtained a garnishee order under the 71st section of the *Common Law Procedure Act*, 1854 (17 & 18 Vict. c. 125), attaching the money of the company in the hands of their bankers, the *National and Provincial Bank of England*. This order was afterwards served on the bank.

On the 4th of January, 1868, an order was made by the Court of law, under the 73rd section of the *Common Law Procedure Act*, that the sum of £217 15s. 7*d*. should be paid by the bank to *Hawkins*, and on the 6th of January it was actually paid to him. *Hawkins* also took proceedings against Mr. *Stewart*, a director of the company, under the 64th section of the *Common Law Procedure Act* (1).

On the 2nd of January a Petition was presented for winding up the company, and on the 7th of January two other Petitions were presented with the same object; and on the 28th of January the Vice-Chancellor made an order on all three Petitions for winding up the company. The official liquidator afterwards took out a summons under the 100th section of the *Companies Act*, 1862 (2), calling upon *Hawkins* to repay the money received from the bank, and the Vice-Chancellor ordered him to repay it.

Mr. *W. Pearson*, for the Appellant:—

The Vice-Chancellor had no jurisdiction to make the order appealed from. In the first place, the 100th section, under which the order professes to be made, only applies to contributories and officers of the company, and other persons who are in the position of trustees for the company. The Appellant is enforcing his rights as a creditor, and cannot be considered in the position of a trustee: *Hollinsworth's Case* (3); *Cox's Case* (4).

Secondly: the money was not the property of the company at

(1) 5 Eq 300.

(2) 25 & 26 Vict. c. 89. The 100th section is as follows:—"The Court may at any time after making an order for winding up a company, require any contributory for the time being settled on the list of contributories, trustee, receiver, banker, or agent or officer of the company, to pay, deliver, convey, surrender, or transfer forthwith, or within such time as the Court directs, to or into the hands of the official liquidator any sum or balance, books, papers, estate, or effects, which happen to be in his hands for the time being, and to which the company is *primâ facie* entitled."

(3) 3 De G. & Sm. 102.

(4) Ibid. 180.

the time of the Petition for winding up. The Defendant was "bound" by the order of the 17th of December, and the right of the creditor, as against the company, was then complete. The case is similar to that of a judgment creditor who has obtained execution, or a landlord who has put in a distress before the Petition, in which cases the Court will not restrain him from proceeding with a sale: *In re Great Ship Company* (1); *In re Exhall Mining Company* (2).

Thirdly: the money was actually paid to the creditor before the winding-up order; and if the attachment did not justify its payment, the bank paid it in their own wrong. The company cannot recover it from the creditor.

Mr. *Karslake*, Q.C., and Mr. *H. Ludlow*, for the official liquidator:—

The Appellant is an assignee of a *chose in action*, and takes it subject to all the equities affecting it. He had notice of the presentation of the winding-up Petition, which was duly advertised.

In the Act under which *Hollinsworth's Case* (3) and *Cox's Case* (4) were decided, there was no provision corresponding to the 103rd section of the *Companies Act*, 1862, which makes payment into the bankers equivalent to payment to the official liquidator. Before the winding-up Petition was presented nothing was done to change the property in the money. The garnishee order of the 17th December did not bind the Defendant in that sense. It gave no lien on the fund in the hands of the bankers. Its only operation was to prevent the bankers from dealing with the debt without regard to the creditor's interest: *Holmes* v. *Tutton* (5); *Redhead* v. *Welton* (6); *Tilbury* v. *Brown* (7). The interpretation put upon the 163rd section of the *Companies Act*, 1862, is, that the Court has a discretion in cases where a creditor has levied execution to allow him to keep the advantage he has obtained: *In re London Cotton Company* (8). But in such cases the creditor has done all that he could do to realize his debt; and even then the Court often restrains him from proceeding: *In re Hill Pottery*

(1) 12 W. R. 139; 33 L. J. (Ch.) 245.
(2) 4 N. R. 127.
(3) 3 De G. & Sm. 102.
(4) Ibid. 180.
(5) 5 E. & B. 65.
(6) 29 Beav. 521.
(7) 30 L. J. (Q. B.) 46.
(8) Law Rep. 2 Eq. 53.

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Company (1); *In re Bastow* (2). In the present case the creditor had not taken all the necessary steps to perfect his title to the money.

[They also referred to *Smith, Fleming & Co.'s Case* (3).]

SIR W. PAGE WOOD, L.J. :—

The case has been very well argued on both sides, but I entertain no doubt that the Court had no jurisdiction to make the order appealed from. The 100th section is as follows :—[His Lordship read the section.] The object of the enactment was to prevent the expense of the company bringing actions against the persons named, who are its own contributories and officers, and ought not to be extended to other persons. I say this the more confidently since the two cases, *Hollinsworth's Case* (4), and *Cox's Case* (5). As to the 103rd section, all that it does is to substitute the bank for the official liquidator. It cannot extend the provisions of the 100th section.

Here the creditor was pursuing his remedy against his debtor by a garnishee order, and having "bound the property" in the hands of the bankers, he proceeded afterwards to take out what might be called an execution, by obtaining an order which enabled him to obtain payment of the money. Rightly or wrongly he was in possession of the money as a creditor, but not as a trustee or receiver for the company. It seems plain to me that there is no jurisdiction under this section to make the order; and I think it better to rest our decision on this ground.

It is, however, right for me to add, that it appears to me that this is a stronger case than that of the *Great Ship Company* (6), and I think that this Court would not have interfered to restrain the Appellant from pursuing his legal remedy after he had obtained such an order as that of the 17th December, the effect of which was, that the Court could not afterwards have ordered the bankers to hand over the money to the company. After that order the whole contest must have been between the garnishee and the creditor. The company could have been no more heard of in the

(1) Law Rep. 1 Eq. 649.
(2) Ibid. 4 Eq. 681.
(3) Ibid. 1 Ch. 538.
(4) 3 De G. & Sm. 102.
(5) 3 De G. 180.
(6) 12 W. R. 139; 33 L. J. (Ch.) 245.

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matter. However, the immediate question is, whether the Court has power to make such an order as this. I think it has not, and that the order must be discharged, and the company must pay the costs both here and in the Court below.

SIR C. J. SELWYN, L.J.:—

I also think that *Hollinsworth's Case* (1), and *Cox's Case* (2), are conclusive authorities that a constructive trust of this kind is not within the 100th section of the *Companies Act*, 1862. I may mention another case, not upon this section, but upon another section in *pari materiâ*, namely, the 165th section of the same Act. I refer to *Feltom's Executors' Case* (3), where Vice-Chancellor *Kindersley* held that the 165th section, which gives special powers against directors and officers of the company who have committed a breach of trust, does not apply to the executors of a deceased director. In the present case, I am of opinion that the order appealed from having been made without jurisdiction, justice requires that the Appellant should be indemnified against all the costs to which he has been put, both here and in the Court below.

Solicitors: Messrs. *Dutton & Warmington*; Messrs. *Noon & Davies*.

In re NATIONAL FINANCIAL COMPANY. *Ex parte* ORIENTAL COMMERCIAL BANK.

L. JJ.
1868
June 25.

Company—Winding-up—Shares held by a Trustee for the Company—Indemnity of Trustee—Trustee ranking as Creditor of the Company for Calls on Shares.

M. was the registered owner of 100 shares in the *T.* company, but he really held them as the nominee and trustee of the *N.* company, and had executed a declaration of trust accordingly. Both the companies being in liquidation, calls to a large amount were made upon *M.* in respect of the shares, which calls he did not pay:—

Held (affirming an order of *Stuart*, V.C., made on *M.*'s application), that *M.* was entitled to rank as a creditor of the *N.* company for the amount of the calls which had been made upon him, and interest thereon, and also for any future calls on the same shares and interest thereon, he under-

(1) 3 De G. & Sm. 102. (2) 3 De G. & Sm. 180.
(3) Law Rep. 1 Eq. 219.

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taking that the liquidator of the *N.* company should be at liberty to pay over to the liquidator of the *T.* company the dividends payable from time to time in the liquidation of the *N.* company to *M.* in respect of the calls, and the liquidator of the *T.* company consenting to accept what might be so paid or payable, in full satisfaction of all claim against *M.* or his estate, in respect of the 100 shares.

THIS was an appeal from an order made by Vice-Chancellor *Stuart* at Chambers.

The *National Financial Company, Limited,* being, by its articles of association, authorized to hold shares in other companies, agreed to take a number of shares in the *Tyne Iron Ship-building Company, Limited.* These shares were to be allotted to nominees of the *National Company,* and those nominees were to hold the shares when allotted on trust for the *National Company.* In pursuance of this arrangement, 100 shares in the *Tyne Company* were allotted to Mr. *George Maitland,* one of the directors of the *National Company,* and he was registered as the owner of those shares. He executed a declaration of trust of the shares for the *National Company,* and also blank transfers. In April, 1865, an arrangement was made for the amalgamation of the *National Company* with a company called the *Oriental Commercial Bank, Limited,* and all the assets of the former company were handed over to the latter company. At this time *Maitland* executed a transfer of the 100 shares in the *Tyne Company* to two directors of the bank, as nominees of the bank, but this transfer was never registered in the books of the *Tyne Company.* Orders were afterwards made for the compulsory winding up of both the *National Company* and the bank, and an order was made giving liberty to the official liquidator of the bank to attend the proceedings in the liquidation of the *National Company.* The *Tyne Company* went into a voluntary liquidation, and calls to the amount of £3250 were made upon *Maitland* in respect of the 100 shares, no part of which sum he paid. On the 28th of April, 1868, the Vice-Chancellor, upon the application of *Maitland,* made the following order:—"The Judge being of opinion that the said *George Maitland* is entitled to be indemnified by the *National Financial Company* in respect of and against the calls, amounting to £3250, that have been made on the said *George Maitland* by the liquidators of the *Tyne Iron Ship-building Com-*

pany in respect of 100 shares held by the said *George Maitland* as the nominee of and trustee for the *National Financial Company*, and in respect of the interest due on the said calls, and in respect of all future calls that may be duly made and payable by the said *George Maitland* in respect of the said shares, and all interest on the same; it is ordered that the said *George Maitland* is entitled to rank as a creditor of the *National Financial Company* for the said sum of £3250 and interest, and for any such future calls and interest on the same, and for his costs as hereinafter mentioned, the said *George Maitland* undertaking that the official liquidator of the *National Financial Company* be at liberty to pay over to the liquidators of the *Tyne Iron Ship-building Company* the dividends which may become payable from time to time in the liquidation of the *National Financial Company* to the said *George Maitland*, or the liquidators of the *Tyne Iron Ship-building Company*, in respect of the said sum of £3250 and interest, and any future calls that may be made upon him as aforesaid; the liquidators of the *Tyne Iron Ship-building Company* consenting to be bound by the terms of this order, and to accept whatever moneys may be so paid or payable by the official liquidator of the *National Financial Company*, in full satisfaction of all claims by the *Tyne Iron Ship-building Company*, or the liquidators thereof, against the said *George Maitland*, or his estate, in respect of the said 100 shares; and it is ordered that the costs of the said *George Maitland* of and incident to this application, including his costs, charges, and expenses properly incurred as such nominee as aforesaid, be taxed as between solicitor and client, and the said *George Maitland* is to be at liberty to add the amount thereof to his aforesaid debt." From this order the official liquidator of the *Oriental Commercial Bank* appealed.

It was alleged, and evidence was adduced to shew, that *Maitland* was indebted to the *National Company* in respect of other transactions in an amount exceeding the amount of the calls which had been made upon him in the liquidation of the *Tyne Company*. It is unnecessary, however, to refer to that evidence in detail.

Mr. *Druce*, Q.C., and Mr. *W. W. Karslake*, for the Appellant:—

The effect of the Vice-Chancellor's order is to make the *cestui*

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que trust the contributory instead of the trustee who was on the register of shareholders. This is contrary to the decision in *Hoare's Case* (1). The most that a trustee is entitled to in such a case is indemnity from his *cestui que trust* in respect of the calls which he has to pay. Mr. *Maitland* has not yet paid anything in respect of these calls, and is therefore entitled to no indemnity. His right is to recover, in the winding up of the *National Company*, what he has paid in respect of calls on these shares in the *Tyne Company*, and that company are only entitled to look to the shareholder whose name is on their register. This order gives them the benefit of a solvent company as contributory instead of Mr. *Maitland*, who may not be able to pay the calls made on him. This we say is inequitable to the contributories of the *Oriental Bank*, who will ultimately have to pay the debts of the *National Company*. Moreover, the evidence shews that Mr. *Maitland* is indebted to the *National Company* in a sum exceeding the amount of these calls, and the Vice-Chancellor's order deprives the *National Company* of their right of set-off in respect of that debt.

Mr. *Greene*, Q.C., and Mr. *Fooks*, for Mr. *Maitland*;

Mr. *Bacon*, Q.C., and Mr. *Higgins*, for the liquidator of the *National Financial Company*; and Mr. *W. N. Lawson*, for the liquidators of the *Tyne Company*, were not called upon.

SIR W. PAGE WOOD, L.J.:—

It does not appear to me that the Vice-Chancellor's order does anything more than work out the most common and ordinary justice. As between Mr. *Maitland* and the *Tyne Company*, according to my view in *Hoare's Case* (1), to which I adhere, I am of opinion that Mr. *Maitland* is the shareholder. If the *Tyne Company* choose to do so, I do not see anything to prevent their exacting from him all payments to which as a shareholder he is liable. But, as between Mr. *Maitland* and the *National Financial Company*, the latter are the shareholders; they are simply his *cestuis que trust*, and his name has been used for their accommodation and for their convenience. The position of a trustee so situated is not that he is to

2 L. D. 604

(1) 2 J. & H. 229.

wait till he is thrown into prison in consequence of his *cestuis que trust* not paying what it is their bounden duty to pay; he has a right to say, "Provide me with the funds which are necessary to meet this difficulty; these are not my shares; I am not the owner of them; I have nothing to do with them; they are yours." *Maitland* being the trustee, and having been called upon to pay the £3250, as between him and the *cestuis que trust*, the latter ought to find the money to pay it. He is called upon to make the payment, and he is entitled to rank as a creditor of the *National Company* for this sum and for any future claim, he undertaking not to pocket this money, but to hand it over in discharge of the liability against which he is entitled to be indemnified. He has therefore undertaken that the official liquidator of the *National Company* shall be at liberty to pay over to the liquidators of the *Tyne Company* the dividends which may become payable from time to time to him in the liquidation of the *National Company* in respect of the £3250. Then the *Tyne Company*, who could not be bound to do any such thing, say: "That being so, we will complete the indemnity to Mr. *Maitland* by undertaking to accept these dividends in lieu of our claims against him." Then as to the statement that Mr. *Maitland* has already made a transfer to two other persons who are not already accepted by the *Tyne Company*, whatever may be said about their willingness to accept them, we have the fact before us that at present Mr. *Maitland*, and no one else, is responsible to the *Tyne Company*. Once establish the fact that he is a trustee, and, as such, is under liabilities at the request and instance of the *cestuis que trust*, the *cestuis que trust* are bound to indemnify him against all the consequences.

As to the question whether a debt will be proved against Mr. *Maitland* in some other proceeding, there is nothing in this order to prevent the company raising any question they please about that debt. They may apply to prevent the official liquidator from acting on the liberty given him by this order if circumstances arise to justify such a course; but, in the meantime, there is nothing to prevent them from honestly discharging their plain duty, namely, indemnifying their trustee from all the consequences of acting on their behalf. I think it is the simplest case possible, and that the appeal must be dismissed with costs.

L. JJ. 1868 *In re* National Financial Co. *Ex parte* Oriental Commercial Bank.

Sir C. J. Selwyn, L.J.:—

The present application is not an application in the matter of the *Tyne Company*. In the *Tyne Company* Mr. *Maitland* is a contributory, and remains a contributory. Upon this application there is no jurisdiction to make any order at all affecting his condition as a contributory in the *Tyne Company*, but this is merely an order to carry into effect the ordinary right of a trustee to be indemnified by his *cestuis que trust* in respect of his liability as a shareholder in the company, and all that is ordered is, that he is to rank as a creditor against the estate of his *cestuis que trust*. The order does not say that when he ranks as a creditor he shall be entitled to receive the sums payable in respect of his debt without reference to the discretion vested in the Court, or without reference to any other claim made against him. Assume that he owes this company £100,000, he would rank as a creditor for £3250; but it would be right in them to say that we will not pay you the £3250 because you owe us a much larger sum. Mr. *Karslake* has put it that they have a right of set-off against him, but a right of set-off is not a right of forfeiture. The claim made is, that because they may have a right to set off at some future time a larger sum of money against Mr. *Maitland*, therefore he is to forfeit the right which otherwise he indisputably possesses of being treated as a trustee entitled to indemnity. That is the substance of the case.

Then it is said that the official liquidator may make the payments authorized by this order without regard to the claims of the company against Mr. *Maitland*. But if the official liquidator, knowing that Mr. *Maitland* is really a debtor, and not a creditor, were to pay over any such sum of money, he would be committing a breach of trust, which would be immediately restrained upon a proper application being made to the Court in the matter of the winding-up. I think that there is no foundation for this appeal motion, and that it must be refused with costs.

Solicitors for the Appellant: Messrs. *Uptons, Johnson, & Upton.*

Solicitors for Mr. *Maitland:* Messrs. *Hoppe & Boyle.*

Solicitor for the Official Liquidators of the *Tyne Company:* Mr. *J. D. Marsden.*

Solicitors for the Official Liquidator of the *National Company:* Messrs. *Lewis, Munns, Nunn, & Longden.*

SIMMONDS *v.* GREAT EASTERN RAILWAY COMPANY.

L. JJ.
1868
July 31.

Solicitor—Lien on Papers in the Cause—Bankruptcy of Plaintiff—Change of Solicitor.

The Plaintiff in a suit became bankrupt, and the suit was revived by his assignee, who employed a different solicitor. A decree was afterwards made :— *Held* (affirming the order of *Giffard*, V.C.), that the solicitor of the original Plaintiff must produce the documents in his possession which were necessary for drawing up the decree, notwithstanding his lien on them for costs, even though the documents were not strictly in evidence in the cause.

THIS was an appeal from an order of Vice-Chancellor *Giffard*, directing Mr. *Thomas Horwood*, a solicitor, to produce certain documents within fourteen days after service of the order.

The suit was instituted by *R. A. Simmonds* against the *Great Eastern Railway Company* for the specific performance of an agreement for sale of certain lands to the company. The Plaintiff's solicitor at the time of the institution of the suit was the Appellant, Mr. *Horwood*, but before the suit came to a hearing the Plaintiff became bankrupt, and the suit was revived by his assignee, Mr. *Hooper*, who retained another solicitor.

The company put in an answer, in which, without denying the Plaintiff's case, they craved leave to refer to the notice to treat, which had been served on the Plaintiff, the award consequent thereon, and certain letters relied on by the Plaintiff. The documents were not proved in the cause, or made the subject of admissions, but when the cause came to a hearing the Defendants offered no opposition to the Plaintiff's case, and a decree was taken for specific performance. When the Registrar was drawing up the decree he called for the production and proof of the documents in question, which were in Mr. *Horwood's* possession, but that gentleman declined to produce them, claiming a lien upon them for costs incurred by him in the progress of the suit, and also previous to its institution.

The Vice-Chancellor made the order for their production, considering himself bound by the authority of *Ross* v. *Laughton* (1). From this order Mr. *Horwood* appealed.

(1) 1 V. & B. 349.

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Mr. *W. Barber* (Mr. *Druce*, Q.C., with him), for the Appellant:—

The solicitor in this case was not discharged for any misconduct, nor did he discharge himself, and therefore there is no ground for depriving him of his lien on the documents. The benefit of his lien would be practically lost if he were obliged to produce the documents, as they are of no importance except for the purpose of drawing up the decree: *Lord* v. *Wormleighton* (1). That case in effect, if not in terms, overruled *Ross* v. *Laughton* (2). *Clifford* v. *Turrill* (3) is distinguishable, because in that case the decree was made before the change of solicitors, and the Court had seizin, as it were, of the documents necessary for drawing up the order. In the present case the decree was taken by the assignee after the bankruptcy.

[SIR C. J. SELWYN, L.J., referred to *Bennett* v. *Baxter* (4).]

Mr. *Swanston*, Q.C., for the Plaintiff:—

Ross v. *Laughton* has never been overruled. There is a distinction between the case of a deceased Plaintiff, where his interest survives to his executors, and that of a bankrupt Plaintiff, where his whole interest is taken from him: *Ex parte Underwood* (5).

Mr. *Spencer Perceval*, for the Defendants.

Mr. *W. Barber*, in reply.

SIR W. PAGE WOOD, L.J.:—

I entertain a strong opinion that the case of *Clifford* v. *Turrill* would have governed the present case if the facts had been similar. This decree appears to have been taken in a hurry, and by arrangement; and then it was proposed to enter in the decree these documents, as if they had been in evidence, which were not strictly in evidence, as they had not been produced at the hearing, nor had they been admitted, although the Defendants made no opposition to the decree. If they had been in evidence (as they ought to have been) I think the principle of the case

(1) Jac. 580.
(2) 1 V. & B. 349.
(3) 2 De G. & Sm. 1.
(4) 10 Sim. 417.
(5) De G. 190.

of *Clifford* v. *Turrill* (1) would have applied, namely, that the Court would not have allowed its decree to be baffled.

As the case stands, we must consider whether *Ross* v. *Laughton* (2) has been overruled by *Lord* v. *Wormleighton* (3). I think it has not. In the first place, Lord *Eldon* does not, in express terms, say that he was overruling it; and in the next place, it seems to me that there is a distinction between the case of an executor and an assignee, because an executor comes in under his testator, and therefore represents him; whereas an assignee comes in by a title adverse to the bankrupt. The bankrupt loses all his interest in the suit, and the assignee may take it up or not as he likes, and is under no obligation to employ the same solicitor. The present case is more like that of *Bennett* v. *Baxter* (4), where the Plaintiff was a creditor, and as he did not conduct the suit with due diligence, it was taken away from him. The Vice-Chancellor there says (5): "The question, then, is whether there is any substantial difference between the case of a solicitor who has discharged himself, and that of the solicitor of a Plaintiff, who, by his own course of conduct, induces the Court to take from him the prosecution of the suit, and to commit it to another party who employs another solicitor?" Here the prosecution of the suit has been taken away from the Plaintiff by reason of his default in becoming bankrupt; the Court, nevertheless, allows the suit to go on, as it did in *Bennett* v. *Baxter*, and the assignee who takes it up is placed in a very analogous position to the second creditor who was substituted for the original Plaintiff in that case. I am therefore of opinion that the appeal must be dismissed, with costs.

SIR C. J. SELWYN, L.J.:—

I am of the same opinion. If *Ross* v. *Laughton* had not been cited in *Lord* v. *Wormleighton* there would have been more foundation for the argument that it was overruled in that case. Considering, however, the care and accuracy of Lord *Eldon*, I think that if he had intended to overrule *Ross* v. *Laughton* he would have said so expressly. There are important differences between

(1) 2 De G. & Sm. 1.
(2) 1 V. & B. 349.
(3) Jac. 580.
(4) 10 Sim. 417.
(5) 10 Sim. 419.

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the position of an executor and an assignee in bankruptcy; as, for instance, with reference to leaseholds, a testator's interest in which devolves on his executors, whereas an assignee may reject them if the lease is prejudicial to the estate. In the present case, in consequence of the default of the Plaintiff, the law has taken all his interest in the suit away from him, and has given it to the assignee. This makes an essential difference between the present case and that of *Lord* v. *Wormleighton* (1), and as Lord *Eldon* did not treat that case in his decision as overruling *Ross* v. *Laughton* (2), it is now too late to hold that it had that effect, especially as the late case of *Clifford* v. *Turrill* (3) is so much in point. The appeal must, therefore, be dismissed.

Solicitor for the Appellant: Mr. *T. Horwood.*
Solicitors for the Assignee: Messrs. *Reed, Phelps, & Sidgwick.*
Solicitors for the Company: Messrs. *Baxter, Rose, Norton, & Co.*

L. JJ.
1868
July 21.

BRAUND *v.* EARL OF DEVON.

Demurrer—Suit for establishment of a Charity—Want of Sanction of Charity Commissioners—Want of Interest in Plaintiffs.

10 Ch 473-4
3 Ch D 615-6
5 Ch D 902-3, 909

A testator gave his pure personal property to trustees upon trust to found and support a school for the gratuitous education of boys; the preference to be given to the lineal descendants of his grandfather. A bill was filed by three of the lineal descendants against the trustees and executors praying for the administration of the estate, and that provision might be made for their education:—

Held (reversing the decision of *Stuart*, V.C.), that the consent of the Charity Commissioners was necessary before the institution of the suit; and a demurrer on the ground that it did not appear that such consent had been given, was allowed.

Whether in such a case an information ought to have been filed—*quære.*

In re Lister's Hospital (4) distinguished.

THIS was an appeal from a decision of Vice-Chancellor *Stuart*, overruling a demurrer to the Plaintiffs' bill.

(1) Jac. 580.
(2) 1 V. & B. 349.
(3) 2 De G. & Sm. 1.
(4) 6 D. M. & G. 184.

The bill stated that *Benedictus Marwood Kelly*, by his will, dated the 29th of September, 1866, after making certain devises and bequests, gave the residue of his estate which might by law be disposed of for charitable purposes, to the Earl of *Devon*, *Thomas Dyke Acland*, *Arthur Kelly*, *Reginald Kelly*, *William Marwood Kelly*, and another gentleman, who had disclaimed the trusts (whom he called his charity trustees), upon the trusts therein declared for establishing and supporting a school in the county of *Devon;* and the testator directed that the income of the trust funds should be applied in providing for the maintenance and education (but not to include clothing) of such a number of boys as the trust fund would, in the judgment of the said charity trustees, for the time being admit of, such boys to be selected by the said charity trustees for the time being, in manner following, that is to say, the lineal descendants of his paternal grandfather, *Arthur Kelly*, and *Mary* his wife, were to be preferred; and a lineal descendant of the said *Arthur Kelly* and *Mary* his wife nearer in relationship to the testator was to be preferred to one more remote in relationship to him; and in default of lineal descendants of the said *Arthur Kelly* and *Mary* his wife, or in case upon any vacancy no such lineal descendant should be a candidate, the sons of officers in the royal navy who had held the rank of lieutenant, or a higher rank, and had been killed in active service, were to be preferred, and in default of such, the sons of deceased officers of the royal navy of the aforesaid rank were to be preferred; and in default of candidates belonging to any of the classes thereinbefore mentioned, the testator left the selection of the objects of the charity entirely to his charity trustees for the time being.

The testator then gave various directions respecting the management of the school, and the appointment and emoluments of the master, and, among other things, directed that any boy who should have attained the age of eight years and should not have attained the age of twelve years should be admissible to the said school, and that the age of eighteen years should be the age of the boys leaving such school, with power, nevertheless, for the trustees to require any boy to leave the same school before he should have attained the age of eighteen, or to permit him to remain after he had attained that age. The testator appointed the Bishop of *Exeter*

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the visitor of the school, and directed annual examinations to be held to ascertain the proficiency of the scholars.

The testator gave his residuary real and personal estate to the said *W. M. Kelly*, and nominated the same persons executors as he had appointed charity trustees.

The bill then stated the death of the testator in September, 1867, and the probate of his will; and that the Plaintiffs, who were respectively of the age of eight, six, and two years, were the nearest lineal descendants of *Arthur Kelly* and *Mary* his wife, and were entitled to be maintained and educated under the trusts of the will in preference to any other persons now in existence or who might hereafter come into existence.

The bill was filed against the charity trustees, who were also the executors, and the Attorney-General, and prayed that the estate of the testator, and the trusts of his will, might be administered under the direction of the Court; and that proper provision might be made for the maintenance and education of the Plaintiffs in accordance with the trusts of the will.

The Defendants, the executors, demurred to the bill for want of equity, and also on the ground that it did not appear on the bill that the sanction of the Charity Commissioners had been obtained for the institution of the suit in accordance with the 17th section of the *Charitable Trusts Act* (1). The Vice-Chancellor over-

(1) 16 & 17 Vict. c. 137. The important parts of the 17th section are as follows:—"Before any suit, petition, or other proceeding (not being an application in any suit or matter actually pending) for obtaining any relief, order, or direction, concerning, or relating to any charity, or the estate, funds, property, or income thereof, shall be commenced, presented, or taken by any person whomsoever, there shall be transmitted by such person to the said board notice in writing of such proposed suit, petition, or proceeding, and such statement, information, and particulars as may be requisite or proper, or may be required from time to time by the said board, for explaining the nature and objects thereof; and the said board, if, upon consideration of the circumstances, they so think fit, may by an order or certificate signed by their secretary authorize or direct any suit, petition, or other proceeding, to be commenced, presented, or taken, with respect to such charity . . . and (save as herein otherwise provided), no suit, petition, or other proceeding for obtaining any such relief, order, or direction, as last aforesaid shall be entertained or proceeded with by the Court of Chancery, or by any Court or Judge, except upon and in conformity with an order or certificate of the said board: provided always, that this enactment shall not extend to or affect any such petition or proceeding in which any person shall claim any property, or seek any relief adversely to any charity."

ruled the demurrer, and the Defendants appealed from his decision.

Mr. *M. Ware* (Mr. *Bacon*, Q.C., with him), in support of the demurrer:—

The first objection to the bill is the want of interest in the Plaintiffs. They are not legatees, they are merely objects of the charity, and, except as such, have no interest in the testator's assets. The way of obtaining relief in such case is by information, not by bill. The Plaintiffs cannot properly represent all the objects of the charity, which is not confined to the special class to which they belong, but extends to children of officers in the navy, and to the public generally. No one but the Attorney-General can represent such a body. The allowance of this bill would introduce a very inconvenient practice, because in every case where a testator gives a legacy to a charity, some of the objects of the charity might file a bill for administration of the estate without the leave of the Attorney-General: *Magdalen College, Oxford*, v. *Sibthorp* (1); *Nash* v. *Morley* (2).

But the bill is also demurrable on the ground that the sanction of the Charity Commissioners has not been obtained. This is not like the case of a committee in lunacy or an assignee in bankruptcy bringing a suit without the permission of the Court, where the Court only can take the objection: for here the language of the statute is imperative, and forbids the institution of the suit until the necessary sanction. The policy of the Legislature was to prevent such suits as the present, which was instituted without any real necessity.

Mr. *Greene*, Q.C., and Mr. *Dauney*, for the Plaintiffs:—

With respect to the first objection to the bill, the Plaintiffs stand on a different footing from the other objects of the charity, for they will be the first persons entitled to the benefit: whoever else may be elected the Plaintiffs cannot be excluded. It is, therefore, a trust as regards them which they are entitled to call upon the Court to enforce: *Blandford* v. *Thackerell* (3).

With regard to the second ground of demurrer, the 17th section

(1) 1 Russ. 154. (2) 5 Beav. 177. (3) 2 Ves. 238.

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of the *Charitable Trusts Act* refers to suits respecting charities already established, not to suits for the purpose of establishing them. The interpretation clause (sect. 66) defines "charity" as "every endowed foundation and institution taking or to take effect in *England* or *Wales*, and coming within the meaning, purview, or interpretation of the statute of the 43 Eliz. c. 4, or as to which, or the revenues or property whereof, the Court of Chancery has or may exercise jurisdiction." The Act was never meant to interfere with the right of any person interested under a will to file an administration suit in order to have the amount of the residue ascertained. The object of the Legislature was to stop the abuses which had grown up, by which the funds of charities were wasted, by proceedings instituted for no good object; and the Court will not construe its provisions so widely as to interfere with the acknowledged jurisdiction of the Court of Chancery: *In re Lister's Hospital* (1); *In re Cheshunt College* (2); *In re St. Giles and St. George's Volunteer Corps* (3). In the present case there is good reason for the institution of the suit, for one of the Plaintiffs will be too old to obtain the benefit of the school if the foundation of it is delayed.

SIR W. PAGE WOOD, L.J.:—

We have come to the conclusion that the demurrer must prevail, upon the ground that this proceeding has been taken without any sanction on the part of the Charity Commissioners. The object, no doubt, of the provision in the statute was, as is stated in *In re Lister's Hospital*, to put an end to certain very scandalous proceedings on the part of individuals who, ascertaining that there was a fund disposable for the purpose of charities which had been overlooked, and thinking that a considerable profit might be made in the way of costs, instituted proceedings which were not likely to produce good to any one. But the object with which that particular section was passed cannot, of course, confine its operation, except so far as the terms warrant it, to the particular cases which originated it. Of course it is impossible to distinguish in any Act of Parliament the motives of those who might afterwards be induced

(1) 6 D. M. & G. 184. (2) 1 Jur. (N.S.) 995.
(3) 25 Beav. 313.

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to institute suits respecting charities; and therefore the Legislature thought it right that, in the case of every suit with reference to the administration of charitable funds, there should be a preliminary application to the Commissioners, a matter of no very great difficulty, not precluding any parties interested in charities from justice, but, on the contrary, very much facilitating and assisting them, and guiding them in the institution of their suits. If these Plaintiffs had applied to the Charity Commissioners it would have saved them from this difficulty. However, they filed their bill three or four months after the probate of the testator's will had been obtained, six months after he died, which was owing, they say, to the fact that the elder Plaintiff is now nearly nine years of age, so that it was important that there should be a speedy establishment of the charity.

Observe what the object of the bill is. It is quite true the Plaintiffs have a substantial interest in the funds of this charity, an interest which might have been sufficient, according to *Blandford* v. *Thackerell* (1), if all the rest of the charity had been bad, to maintain their right to the gift, and to be educated in the manner here described; but the charity is not bad; it is no part of the case made by the bill. The case made by the bill is, that there is a residue, and the object of the bill is to have the estate of the testator and the trusts of his will administered, that proper provision may be made for the maintenance and education of the Plaintiffs respectively in accordance with the trusts of the will, and that for those purposes all needful inquiries and directions may be made and given. Now they can come here in this particular case in no other way than as objects of the charity. The charity is a lawful one in every point of view. They come here as special objects of the charity, and it is a charity as to which the testator has taken particular pains, and has given very specific directions for carrying the whole into effect. [His Lordship then referred to the directions mentioned above, and continued:—] All these provisions render it quite clear that the present Plaintiffs must come in as part of the general body of those who are to be educated. It is not like the case of *Blandford* v. *Thackerell*, in which the Plaintiffs could have a special and particular benefit,

(1) 2 Ves. 238.

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although all the rest of the objects were cut off. Here they must come in as part of the objects of the school, on the same footing as all the other boys, and subject to an examination, and to removal before they attain the age of eighteen, at the discretion of the trustees. That being so, I do not say that they would not have a right individually as Plaintiffs; that is a part of the case upon which it is not necessary for me to express any further opinion, although I am rather inclined to think that they would. But if they have such an individual right, they must at the same time come in upon the foundation of the charity. They have no other ground for administering the estate except for the purpose of constituting this charity.

It is said, however, that there is a difference between constituting a charity and dealing with a charity already constituted. In the first place, supposing the testator had left £20,000 for the foundation of this charity, it could not be said that the charity was not constituted by that gift being set aside for the purpose; and I cannot suppose that there is any substantial difference in the provisions of this Act of Parliament between the gift of a legacy and the gift of the residue of the testator's estate. The interpretation clause (sect. 66) to which we have been referred, appears to me to be adverse to the contention of the present Plaintiffs. All the expressions in it are applicable to the present charity.

We then come to the 17th section:—[His Lordship read the section.] Now how can we sitting here entertain this suit, which is in direct contravention of this Act of Parliament, except it be in conformity with such an order as the Act prescribes? And how can we know whether there is such conformity unless the order is set out that we may see that we are acting in conformity with the order? It appears to me that the case of *In re Lister's Hospital* (1) is manifestly distinguishable from this. The Court there agreed with the view which I had taken in a previous case, namely, that a petition of that nature did not deal with the charity *quà* charity; but there being already a well constituted charity and a pending matter, namely, the payment of money into Court, which was necessarily applicable to lands to be held upon the same uses, the petition was not an original petition

(1) 6 D. M. & G. 184.

to regulate the charity itself, but was simply for the purpose of doing that which the common order and forms of the Court would require to be done, namely, to invest a sum of money which had to be invested as if in the case of an ordinary settlement. That seemed to me not to come within the purview of the Act. But here, if there be any one thing more plain than another, it is that these persons cannot have any benefit until the charity is established by the fund being appropriated for this purpose. If the Plaintiffs' interpretation of the Act were to prevail, this Act, which contemplated the avoiding of expense, would have the effect of creating great additional expenses, for the Plaintiffs would have a right to have the residue ascertained, and then there must be a new suit for the establishment of the charity. This could never have been the intention of the Act. Upon these grounds the demurrer must be allowed.

SIR C. J. SELWYN, L.J.:—

The property which is the subject matter of this suit is described as all the testator's personal property "which can at my death be by law disposed of for charitable purposes." The persons to whom the property is given are by the will expressly called throughout the charity trustees; and there being no individual bequests given to the Plaintiffs, except so far as they can bring themselves within the scope of the charitable trust so constituted, they come to ask for the interference of this Court upon the ground of their being entitled to the benefit of the charity so constituted. In point of fact, their bill necessarily presupposes the foundation of the charity, and presupposes the existence of a fund which constitutes the endowment of the charity; without that the bill would be open to demurrer on the ground of there being no property the subject matter of the suit. Under these circumstances the charity is strictly brought within the definition in the 66th section of this Act; and if so, the suit is in the very terms of the Act a suit for obtaining relief "concerning or relating to any charity, or the estate, funds, property, or income thereof." That is the whole object of this suit. This Act of Parliament, which I think is of a most useful character, was intended to prevent cases, formerly of frequent occurrence, in which parties commence suits nominally for

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the benefit of a charity, but really for the purpose of creating costs. It was so exceedingly difficult for the Court to judge of the real motives of the promoters of those suits, that it was almost in every case obliged, where there was no positive evidence of bad motives, to make the usual order for costs out of the estate. Accordingly, the Act provided that in every case "relating to any charity, or the estate, funds, property, or income thereof," previous application should be made to the Charity Commissioners.

It is said, in the first place, that although there are those general words in the Act, it does not apply to the case of a charity not already constituted. That objection has been already sufficiently disposed of by my learned brother, and it is impossible to conceive any words more wide than those of the Act. There is no condition precedent in this section, that those funds should have been ascertained, or should have been set apart, or any scheme directed for the administration of those funds. The words are general, and we are bound to follow them.

Then it is said that these Plaintiffs should not be delayed, for it would be a most lamentable thing if one of these boys were to lose the advantage of education under the charity. It appears to me that this suit is much more likely to delay the progress of his education than a simple and ordinary application to the Charity Commissioners, which may be made without any expense or delay, and where he would obtain the advantage of the advice and assistance of persons having the largest possible experience in those matters, and who would be able to say whether, in their judgment, as the result of that experience, any suit in this Court was necessary. That the Plaintiffs have not thought necessary to do. I think that the demurrer must be allowed in the usual way.

Solicitor for the Plaintiffs: Mr. *M. K. Braund.*
Solicitors for the Defendants: Messrs. *Field, Roscoe, & Co.*

WRIGHT *v.* PITT.

L. JJ.
1868
July 23.

Affidavit of Documents—Further Affidavit—"Reasonable Suspicion."

A Plaintiff, being ordered to make an affidavit as to documents in his possession, filed an affidavit with a schedule of documents not including any title deeds of the property to which the suit related, and of which he was the owner in possession. There was nothing in the proceedings to shew whether any title deeds existed. The Defendants moved that he might be ordered to file a further affidavit as to title deeds:—

Held, that the probability of the Plaintiff having title deeds did not raise such a "reasonable suspicion" of the insufficiency of the affidavit as to entitle the Defendants to call upon him for a further one, as in *Noel* v. *Noel* (1).

Per Wood, L.J.:—The rule in *Noel* v. *Noel* can only be applied where the party making the affidavit has made some admission which discredits it.

Per Selwyn, L.J.:—If "reasonable suspicion" be sufficient ground to call for a further affidavit, it must be suspicion founded on the pleadings and affidavits, and not on mere surmise.

THIS was a motion by the Defendants by way of appeal from a decision of Vice-Chancellor *Malins*.

The bill was filed by the Plaintiff as owner in fee of certain lands in the parish of *Eyam* in *Derbyshire*, to restrain the Defendants from getting lead ore under them without his consent. The bill alleged that the Defendants claimed a right to get lead ore by virtue of a custom making it lawful for all subjects of the realm to get it within a certain district in which these lands were included. The bill did not deny the custom, but alleged that ancient freeholds were exempt from it, and that the lands in question were ancient freeholds. The Defendants, by their answer, denied that the lands were ancient freeholds.

On the 19th of March, 1868, the common order was made on the application of the Defendants for the Plaintiff to make an affidavit as to documents in his possession relating to the matters in question in the cause. The Plaintiff filed an affidavit accordingly, which was sufficient in form, referring to a schedule of documents, and concluding with the usual traverse of his having

(1) 1 D. J. & S. 468.

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any others. The schedule comprised a lease from the Plaintiff which was mentioned in the bill, and certain letters and memoranda, but did not refer to any title deeds to the lands in question. The Defendants, on the 26th of May, moved before Vice-Chancellor *Malins* that the Plaintiff might be ordered to make a further affidavit as to title deeds and documents relating to the land in question. The Vice-Chancellor refused the motion with costs. 13 W R 149. 16 L T 703)

Mr. *Cotton*, Q.C., and Mr. *Hemming*, for the Appellants:—

There is enough to raise reasonable suspicion that a full discovery of documents has not been made, for it is hardly conceivable that the Plaintiff should have no title deeds, or other documents of title, and should never have had any. According, therefore, to the principle laid down in *Noel* v. *Noel* (1), there ought to be a further affidavit. The Defendants ought not to be put to the expense of filing a concise statement and interrogatories to get this discovery. If the Plaintiff has not any title deeds, it is easy for him to swear that he has not; if he has, they ought to be scheduled, for they clearly relate to the matters in question. Whether they ought to be produced is a matter to be decided in a separate proceeding.

Mr. *Cole*, Q.C., and Mr. *Bagshawe*, for the Plaintiff, were not called upon.

SIR W. PAGE WOOD, L.J.:—

In my opinion there are two grounds for not complying with this application. In the first place, the general rule is, that the party seeking a discovery of documents must rest on the affidavit: he cannot cross-examine upon it nor adduce evidence to contradict it. If, indeed, as in *Noel* v. *Noel*, you can shew that the deponent has made on oath a statement which is inconsistent with his affidavit, then his affidavit is proved by himself to be insufficient, and the Court will compel him to make a further affidavit. It is now attempted, by force of the Lord Justice *Turner's* expression of "reasonable suspicion," to carry the rule far beyond anything that

(1) 1 D. J. & S. 468. 9 Jur (N S) 509

was decided in that case. It is urged that a man cannot have land without having title deeds, but that is not so; his ancestor may have mortgaged the land, so that he may never have had any deeds in his possession. My opinion has always been, that in order to make the principle of *Noel* v. *Noel* (1) applicable, it must be shewn that the party has made some admission throwing discredit on the sufficiency of his affidavit.

The second ground is this, that there is no reason for suspicion that the Plaintiff has documents which would help the Defendants to make out their case. It is admitted that the Defendants are entitled to work unless the Plaintiff can prove his lands to be ancient freeholds, and there cannot be anything better for them than that he should have no title deeds to produce. The motion must be refused with costs.

SIR C. J. SELWYN, L.J.:—

Even if we are to adopt the expression "reasonable suspicion" used in *Noel* v. *Noel*, which I do not think a very happy one, such suspicion must, I think, be one founded on the pleadings and affidavits. In *Noel* v. *Noel* there was an admission that there had been other documents, and there was therefore reasonable suspicion that the affidavit which did not mention them was insufficient. Here there is nothing on the pleadings or affidavits to raise any reasonable suspicion. We are asked to act on a mere surmise, and this we cannot do.

Solicitors: Messrs. *Palmer, Eland, & Nettleship;* Mr. *F. K. Munton.*

(1) 1 D. J. & S. 468.

L. JJ.
1868
July 31.

WALFORD *v.* WALFORD.

Practice—Suspending Proceedings pending an Appeal to the House of Lords—Irreparable Injury.

The business of a solicitor had been carried on by a succession of firms in a particular house for thirty years. Eventually, the Plaintiff and Defendant, who were the last continuing partners, dissolved partnership, and the Plaintiff filed a bill against the Defendant, and obtained a decree, which he immediately enrolled, declaring that the Defendant had no interest in the house, and restraining him from entering it. The Defendant being about to appeal to the House of Lords against the decree, moved to suspend the injunction pending the appeal:—

Held (reversing the order of *Stuart*, V.C.), that the case was one in which irreparable injury might be done to the Defendant; and, the Defendant undertaking to proceed with the appeal with due diligence, and to abide by any order as to damages which the Court might make, the Court suspended the injunction pending the appeal.

THIS was an appeal from an order of Vice-Chancellor *Stuart*, refusing an application by the Defendant *Herbert Henry Walford*.

In the year 1857 the Plaintiff and his brothers, *Thomas Walford* and *Arthur Walford*, were carrying on the business of solicitors in partnership at No. 27, *Bolton Street, Piccadilly*. The house was held under a lease originally granted to their predecessors in the business in 1836. On the 30th of April, 1857, a renewed lease of the house was granted to the Plaintiff, *Thomas Walford*, *Arthur Walford*, and *Thomas Sturges Walford*, therein described as "all of No. 27, *Bolton Street*, *Piccadilly*, solicitors," for twenty-one years from the 25th of December, 1856. *Thomas Sturges Walford* was only a nominal member in the firm, and had no interest in the assets, but the other three lessees were carrying on the business of solicitors in partnership. In January, 1859, the Defendant, *Herbert Henry Walford*, the son of *Arthur Walford*, was admitted into the partnership. *Arthur Walford* died in September, 1859, and *Thomas Walford* in December, 1861. The Plaintiff and the Defendant *H. H. Walford* continued to carry on the business at the same house in partnership, though their interests had varied by the deaths of partners, until the 31st of August, 1867, when the Defendant gave the Plaintiff notice to dissolve the partnership.

and since that date the Plaintiff and Defendant, and their respective clerks, had occupied different rooms of the same house, carrying on their profession separately.

The Plaintiff by his bill, claimed the whole house as the surviving lessee and last continuing partner, and prayed that the Defendant might be restrained from occupying the house. The Vice-Chancellor made a decree on the 6th of July, 1868, declaring that the partnership was dissolved as from the 31st of August, 1867, and that the Defendant was not entitled to any beneficial interest in the house in *Bolton Street;* and granted an injunction restraining the Defendant, his servants or agents, from entering or making any use of the house, or interfering with the Plaintiff's occupation.

On the 17th of July, 1868, the Defendant moved that the injunction should be suspended till the appeal intended to be lodged against the decree could be heard. The Vice-Chancellor refused the motion.

On the 22nd of July the Defendant left the Petition of appeal against the decree with the Lord Chancellor's secretary, and on the 24th of July gave notice of appeal against the order of the 17th of July. On the 28th of July the order was made to set down the appeal for hearing.

In the meantime, on the 27th of July, the Plaintiff enrolled the decree, thereby preventing the cause from being re-heard before the Court of Appeal in Chancery.

The Plaintiff now brought on the appeal motion before the Lords Justices, but as the decree had been enrolled since the notice of motion was given, he asked at the Bar that the injunction might be suspended during an appeal to the House of Lords. The appeal had not yet been presented, but the Plaintiff offered to give an undertaking that he would forthwith present it.

Mr. *Jessel*, Q.C., Mr. *Wickens*, and Mr. *Kekewich*, for the Appellant:—

It would be a great hardship for the Defendant, in a case which involves partnership questions of some difficulty, to be suddenly ejected from a house where he has carried on business so long. If the decree should be reversed the Defendant will have suffered

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irreparable injury, as the goodwill attached to the occupation of the premises will be lost: *Storey* v. *Lord Lennox* (1); *Topham* v. *Duke of Portland* (2).

Mr. *Bacon*, Q.C., and Mr. C. *Hall*, for the Plaintiff:—

The Defendant cannot succeed on this motion. He asks for suspension of the proceedings till the rehearing by the Court of Appeal of Chancery. The decree has now been enrolled, and the rehearing has become impossible. What he now asks at the Bar is a very different thing, and the effect of granting it would be to suspend the proceedings for more than a year. With respect to the merits of the case, the Defendant's interest in the house ceased when he retired from the partnership, and he ought at once to give it up. The cases where the Court has suspended proceedings during an appeal have been mostly where orders have been made for payment of money. This was the case in *Topham* v. *Duke of Portland*.

SIR W. PAGE WOOD, L.J.:—

The usual course is to stay proceedings pending an appeal only when the proceedings would cause irreparable injury to the Appellant. Mere inconvenience and annoyance is not enough to induce the Court to take away from the successful party the benefit of his decree. In the present case the business has been carried on in the house in question for thirty years; the Defendant joined the partnership eight years ago, in the lifetime of his father, and from that time to the present has been carrying on the business as a member of successive firms in the same house. A question has arisen, whether this house is part of the partnership assets; the importance to the Defendant of his being allowed to retain his name where it has been for so many years is manifest. There is a *bonâ fide* intention to appeal, and we think it is a proper case for the interference of the Court.

With respect to the time which must elapse before the appeal is heard, that is the Plaintiff's own fault. If he had not enrolled the decree so hastily the matter might have come to a conclusion much sooner.

(1) 1 My. & Cr. 685. (2) 1 D. J. & S. 603.

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With respect to the form of the notice of motion, we think that as all parties are before the Court, we may make such order as is just notwithstanding the informality.

The order will be in the following form:—"The Defendant undertaking to present and prosecute with due diligence an appeal to the House of Lords, and to abide by any order which this Court shall make as to payment of any damages which may be incurred by the Plaintiff in consequence of this order, and also undertaking not to interfere with the occupation of the house by the Plaintiff, as it existed before the filing of the bill, let so much of the order as restrains the Defendant from entering or making use of the house, be stayed pending the appeal."

There will be no costs of this appeal.

SIR C. J. SELWYN, L.J.:—

I agree.

Solicitors for the Plaintiff: Messrs. *Skilbeck & Griffith.*
Solicitors for the Defendant: Messrs. *Nicholson & Herbert.*

WARRICK *v.* QUEEN'S COLLEGE, OXFORD.

L. JJ.
1868
May 28.

Practice—Amendment of Bill—Adding Parties.

Plaintiffs, on behalf of themselves and all the tenants of a manor, filed a bill against the lords of the manor to have the rights of the tenants over uninclosed lands declared. After the expiration of four weeks from the time when the answer became sufficient, the Plaintiffs obtained, *ex parte*, without evidence, an order for leave to add a certain company as Defendant, with apt words, and all necessary allegations. They amended the bill by making the company a party, and alleging that the lord of the manor had sold part of the lands to the company, and that the company was inclosing them:—

Held, that the order was irregularly obtained, and must be discharged, and the amendments expunged.

THIS was a motion by the Defendants, the Queen's College, Oxford, to discharge an order made by Vice-Chancellor *Malins*

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for the Master of the Rolls, in the Easter Vacation, giving the Plaintiffs leave to amend their bill for the purpose of making the *British Land Company* and their secretary parties to the suit, with apt words to charge them, and with all necessary allegations.

The bill was filed on the 4th of August, 1866, by the Plaintiffs, on behalf of themselves and all other the tenants of the manor of *Plumstead*, against *Queen's College, Oxford*, and its provost, as lords of the manor, to establish certain rights claimed by the tenants over some uninclosed lands, and to restrain certain proceedings alleged to be prejudicial to those rights. The bill was amended on the 18th of August, 1866. The College filed their answer on the 10th of November following, disputing the rights of the tenants, and stating that some of the lands had been sold by the College in February, 1866, before the institution of the suit, to the *British Land Company*. On the 1st of July, 1867, the bill was re-amended. The College filed their answer to the re-amended bill on the 15th of October, 1867; and the time for excepting expired on the 10th of December. The time for obtaining an order of course to amend expired on the 21st of January, 1868.

On the 2nd of April, 1868, the order in question was obtained on an *ex parte* application, without any evidence, giving the Plaintiffs leave to amend by adding the company as parties, with apt words to charge them, and with all necessary allegations.

The amendments introduced consisted in adding the *British Land Company* and their secretary as parties, and inserting allegations that the College, in 1866, had sold some of the lands in question to the company, and that the company were inclosing them.

Mr. *Baggallay*, Q.C., and Mr. *Lindley*, for the appeal motion:—

This was a special order under Cons. Ord. IX., r. 15, made without the evidence there required, and so is irregular. The application to discharge it must be made here: Cons. Ord. VI r. 11.

Mr. *Jessel*, Q.C., and Mr. *W. R. Fisher*, for the Plaintiffs:—

The order being a mere order to amend by adding parties, was

an order of course: *Daniell's* Chancery Practice (1); *Brattle* v. *Waterman* (2); *Bryan* v. *Wastell* (3); *Hayward* v. *Price* (4).

Mr. *C. T. Simpson*, for the land company.

SIR W. PAGE WOOD, L.J.:—

I am of opinion that this order was irregularly obtained. The cases referred to by the Plaintiffs were simple cases of adding parties who ought to be before the Court that their interests might be bound, but who could not have an independent case. Here the Plaintiffs, though informed of the interests of the land company by the first answer, took no steps to make them parties till it was too late to obtain an order of course to amend. These parties may have an entirely different case from the original Defendants; and I am of opinion that the principle of the cases which have been referred to has no application so as to authorize such an order as the present one to be made as of course without any evidence. As to the question whether this is the proper Court to come to, I am clearly of opinion that we have jurisdiction; and the only possible doubt is, whether it was necessary for the Appellants to come here. I think, however, that there is upon the construction of the General Orders enough to justify them in making the application to us rather than to the Master of the Rolls. The order of the Vice-Chancellor must be discharged, and the amendments expunged, with costs to be paid by the Plaintiffs.

SIR C. J. SELWYN, L.J., concurred.

Solicitors: Mr. *P. H. Lawrence*; Messrs. *White & Borrett*.

(1) 4th Ed. p. 372.
(2) 4 Sim. 125.
(3) Kay, App. 47.
(4) 14 Jur. 1083.

L. JJ.
1868
May 28.

BOYD *v.* PETRIE.

Practice—Documents—Inspection by Witnesses.

An application before decree to have documents produced for inspection to intended witnesses is a special application, and only to be made on special grounds.

Where Defendants did not by their answer deny the genuineness of a deed, but merely stated that they did not know whether they had executed it, and after an ordinary inspection applied for an order allowing inspection of it by witnesses, which application was not supported by any affidavit as to the deed being forged, but only by an affidavit of the Defendants' solicitor to the effect that he was advised and believed that it was necessary to his clients' case that the deed should be so inspected by witnesses :—

Held (reversing the order of the Master of the Rolls), that an order for inspection by witnesses ought not to be made.

THIS was an appeal motion by the Plaintiffs to discharge an order of the Master of the Rolls made before decree, which directed "that Defendants, *M. Thellusson* and *S. Grant*, giving one clear day's notice, containing the names and addresses of such persons as they propose to examine as witnesses in relation to the deeds dated respectively the 1st and 2nd of February, 1830, in the bill mentioned, the said Defendants and their solicitors, and the persons whose names shall be so given, be at liberty from time to time to inspect and peruse the said deeds at the office, and in the presence of the solicitors for the Plaintiffs."

The answer of the Defendants, *M. Thellusson* and *S. Grant*, did not allege that the deeds in question were forged; the case set up being in substance that the Defendants did not know whether they had executed the deeds or not, but that if they had they had done so in ignorance of their nature. The application of the Defendants for production of the deeds to witnesses was supported only by an affidavit of their solicitor, which did not allege the deeds to be forged, but stated that he was advised and believes that it was material and necessary to the case of the Defendants that the deeds should be inspected by persons who were to give evidence about them. The facts will be found more fully stated in the report of the case before the Master of the Rolls (1).

(1) Law Rep. 5 Eq. 290.

Mr. *Parke*, for the Plaintiffs, in support of the appeal motion, referred to *Hart* v. *Montefiore* (1); *Groves* v. *Groves* (2); *Swansea Vale Railway Company* v. *Budd* (3); *Morgan's* Chancery Orders (4).

Mr. *Phear*, for the Defendants, referred to *Taylor* on Evidence (5); *Thomas* v. *Dunn* (6).

SIR W. PAGE WOOD, L.J.:—

We cannot on the materials before us support this order. It is a very special application to have an order for production of documents otherwise than in the ordinary way, that is, to the party, his solicitors or agents, before the Examiner, and at the hearing of the cause. Whether that be right or wrong, convenient or inconvenient, we need not speculate; it is the established form of order, and can only be departed from on some intelligible grounds of decision. A special application must be supported by special grounds. Here the applicants by their answers do not dispute the genuineness of the deeds in question, further than by saying that they do not know whether they ever executed them. And now, after inspection under the common order, we are furnished, not with an assertion of belief that the deeds are forged, but merely with an affidavit by the solicitor that he is advised and believes that it is material and necessary to the case of the Defendants that the deeds should be produced for the inspection of certain other persons. There is nothing in a loose affidavit like this to justify a departure from the usual form of order. I well remember the case of *Groves* v. *Groves* (7). There a creditor coming in to prove his debt, stated that he had in his possession documents on which he intended to found his claim. An application was thereupon made to me to order production of them for inspection by witnesses, and was refused. On the next occasion the creditor produced them in evidence, and there being grave reason to suspect that they were not genuine, I made an order allowing their inspection by witnesses. If the question were as to saving the

(1) 30 Beav. 280.
(2) Kay, App. xix.; S. C. at an earlier stage, 2 W. R. 86.
(3) Law Rep. 2 Eq. 274.
(4) Page 173.
(5) 5th Ed. pp. 1526—1529.
(6) 6 Man. & G. 274.
(7) Kay, App. xix.

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expense of a supplemental answer, or of a bill to impeach the deeds, as suggested by the Master of the Rolls, I should wish to do so, but we cannot suppose that there is any reasonable ground for impeaching the genuineness of the deeds when, after inspection, the case is rested on such an affidavit as that to which I have referred, in which it is to be presumed that the deponent has said as much as there is to be said.

SIR C. J. SELWYN, L.J., concurred.

Solicitors: Mr. *T. Gill, jun.*; Messrs. *Parke & Pollock.*

L. JJ. 1868 *July* 16, 23.

RICHES *v.* OWEN.

Creditors' Deed—Receiver—Bankruptcy Act, 1861.

The inspectors appointed by a deed of inspectorship registered under the *Bankruptcy Act*, 1861, filed a bill against the debtor, alleging that he was dealing with his assets in a manner contrary to the covenants of the deed; that they were unable to prevent his proceedings; and that irreparable mischief would result from them; and praying for the appointment of a receiver:—

Held (affirming the decision of *Giffard*, V.C.), that the Court had jurisdiction to appoint a receiver, though it might have no jurisdiction to administer the assets.

THIS was a motion by way of appeal from an order of Vice-Chancellor *Giffard*, for the appointment of a receiver.

By a deed of inspectorship, dated 20th of February, 1868, made between the Defendant of the first part, the Plaintiffs as inspectors of the second part, and the persons, companies, and firms, who were creditors of the Defendant, or would be entitled to prove under an adjudication of bankruptcy against him if made on that day, of the third part, the creditors granted a license to the debtor to conduct his business, and dispose of his real and personal estate under the direction of the inspectors without any interference by the creditors. The debtor covenanted with the inspectors, among other things, to furnish them with full accounts of his debts, liabilities, credits, and assets, and to sell or mortgage his estate and

effects when required by the inspectors, and he appointed the inspectors his attorneys to receive his estate, to be applied under their direction as in bankruptcy.

This deed was registered under the *Bankruptcy Act*, 1861, and assented to by the requisite majority of creditors.

The bill filed by the inspectors against the debtor alleged that the moneys which had come to their hands had not been sufficient to pay their expenses; that the Defendant disregarded the stipulations of the deed, and wilfully prevented the liquidation of his affairs; that he refused to furnish the inspectors with accounts; that he had received and applied to his own use various sums which ought to have been placed under the control of the inspectors and applied in payment of his debts; and that he intended to receive and apply to his own use other moneys owing to him; and that his circumstances were such, that the sums already received by him were, and those to be received by him would be, irrecoverably lost; that the Defendant had been applied to by the inspectors to sell his furniture, and to concur in a mortgage of his real estate, but refused to do either. The bill prayed that an account might be taken of the estate, effects, and credits of the Defendant which were subject to the deed, and of the claims and liabilities upon his estate; that an account might be taken of the dealings of the Defendant in relation to his estate since the execution of the deed, and particularly an account of all debts received by him, and that he might be ordered to pay to the inspectors the amount of what he had so received; that a receiver might be appointed to get in the outstanding estate of the Defendant; and that the Defendant might be restrained from receiving his credits and book debts, and from preventing the inspectors from discharging their duties under the deed, and that the estate might be administered under the direction of the Court.

On the 28th of May, 1868, Vice-Chancellor *Giffard* made the order now under appeal:—"The Plaintiffs, by their counsel, undertaking to submit to any order which may be hereafter made as to payment over to the Court of Bankruptcy by the receiver to be appointed pursuant to this order of any moneys to be received by him, this Court doth order that a proper person be appointed to receive and get in the outstanding credits and book debts and

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estate of the Defendant in the Plaintiffs' bill mentioned," with the usual directions as to delivery of securities, and books and papers to the receiver, and as to his passing his accounts and paying in his balances.

Mr. *B. B. Rogers*, for the appeal motion:—

This Court will not interfere with administration in bankruptcy or insolvency: *Wearing* v. *Ellis* (1); *Dyson* v. *Hornby* (2); *Preston* v. *Wilson* (3). The *Bankruptcy Act*, 1861, puts registered deeds under the exclusive control of the Court of Bankruptcy, sects. 192–200: *Ex parte Morgan* (4). If a receiver is wanted, the Court of Bankruptcy can appoint one: *Griffiths' and Holmes'* Bankruptcy (5); and its powers are enlarged by the *Bankruptcy Act*, 1861, which enables it to exercise all the powers of Courts of Law and Equity which are necessary to enable it to discharge its functions: *Skilton* v. *Symonds* (6). It is true that the Court of Bankruptcy has never appointed receivers, but until this Act there never could be a case in which there was occasion for it to do so. This Court only appoints a receiver in the course of its own administration of an estate, or to protect property where there is actual litigation before other tribunals. It will not appoint one in aid of a reference to arbitration: *Street* v. *Rigby* (7); nor where litigation is merely expected: *Jones* v. *Jones* (8); *Jones* v. *Frost* (9).

Mr. *Druce*, Q.C., and Mr. *Dauney*, for the Plaintiffs, were not called upon.

SIR W. PAGE WOOD, L.J.:—

I am of opinion that we ought not to interfere with the order of the Vice-Chancellor. The Defendant executed a deed of inspectorship with covenants binding him to deal with his property according to the directions of the inspectors. The bill alleges that he is dealing with it contrary to those covenants. The inspectors say that they cannot prevent this, that irreparable mischief will

(1) 6 D. M. & G. 596.
(2) 7 Ibid. 1.
(3) 5 Hare, 185.
(4) 1 D. J. & S. 288.
(5) Page 668.
(6) 18 C. B. (N.S.) 418.
(7) 6 Ves. 815.
(8) 3 Mer. 161.
(9) Jac. 466.

ensue, and they ask for a receiver. I feel no doubt that this Court will interfere, where necessary, to prevent irreparable mischief from breach of covenant, although the property may have to be distributed in bankruptcy, and though the Court of Bankruptcy may be able to give the same relief. Whether the Court of Bankruptcy has power to appoint a receiver or not, at all events there is no instance of it ever having done so; and the relief sought, on this motion, certainly cannot be obtained there so speedily as here. The order is so guarded that I cannot apprehend any danger of its leading to a conflict between this Court and the Court of Bankruptcy.

SIR C. J. SELWYN, L.J.:—

I am of the same opinion. This insolvent debtor asks us to decide the abstract question, whether a Court of Equity has jurisdiction to appoint a receiver in the case of a registered deed. It needs but little experience to know that enormous frauds are perpetrated by means of these deeds, and it would be most mischievous to say that this Court has no jurisdiction to interfere in the way asked by this bill.

Solicitors for Appellant: Messrs. *Ridsdale & Craddock.*
Solicitors for Plaintiffs: Messrs. *Ellis, Parker, & Clarke.*

Ex parte PROTHERO. *In re* BARFOOT.

Bankruptcy—Suspension of Proceedings under Bankruptcy Act, 1861, *s.* 110 *—Right to Vote—Trustees.*

Trustees who were carrying on a trade and had been admitted to prove in bankruptcy for a debt on behalf of their *cestuis que trust*:—

Held, entitled to vote on a resolution for a suspension of proceedings under the 110th section of the *Bankruptcy Act*, 1861.

THIS was an appeal from a decision of Mr. Commissioner *Hill*, of the *Bristol* district Court of Bankruptcy.

Barfoot was duly adjudicated a bankrupt, and at the first meeting of the creditors on the 10th of June, 1868, a creditors' assignee

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was chosen. At the same meeting the bankrupt proposed to make a composition with his creditors by paying 5*s.* in the pound, and a majority of the creditors present having approved of the proposal, a meeting was called for the 24th of June (which was afterwards adjourned to the 26th), for formally considering the proposal under the provisions of the 110th section of the *Bankruptcy Act*, 1861.

Messrs. *Prothero* were the trustees of some coal mines, in which they and several others were interested; and they had full powers, under the trust deed, of management and trading, and authority to receive and pay debts, but not to compound debts. They appeared by their agent at the meeting of the 26th of June, and claimed to be permitted to prove against the bankrupt's estate in respect of a debt due from the bankrupt to them in the course of their trade. The Commissioner gave them leave to prove; and Messrs. *Prothero* then claimed to be allowed to vote on the question of the proposal for a composition. The Commissioner refused to allow them to vote, but offered to permit them to cross-examine the bankrupt, in order to elicit any facts which they might desire, in order to guide him in considering a formal application, after due notice, for leave to vote. The Appellants, however, insisted on their right to an immediate vote, and declined to cross-examine the bankrupt. Their vote was accordingly rejected, and the resolution to accept the composition and suspend the proceedings in bankruptcy was carried by the requisite majority of the other creditors.

From this decision the trustees appealed.

Mr. *Everitt*, for the Appellants:—

The trustees having obtained leave to prove, have a right to vote as creditors. They are not bare trustees: they are interested themselves, and have not only the power to recover money, but to expend it: *Ex parte Cadwallader* (1). Even if the trustees would have had no right to vote on the choice of assignees, they are entitled to vote on a question like the present.

Mr. *De Gex*, Q.C., for the bankrupt:—

A trustee has no right of proof without his *cestui que trust*: *Ex parte Dubois* (2); and the rule is well established, that although

(1) 31 L. J. (Bkcy.) 66. 4 De G. J. 499

(2) 1 Cox, 310.

a trustee may obtain leave to prove on behalf of his *cestui que trust*, his power originates in the order of the Court, and does not carry with it the right to vote for assignees; nor could he sign the bankrupt's certificate under the old bankruptcy law: *Ex parte Shaw* (1); *Ex parte Wyatt* (2); *Griffith* and *Holme's* Bankruptcy (3). In the present case, the trustees had a power under their deed to recover money, but not to compound debts. So that they only had power to vote against the resolution, and had no discretion to vote for it.

The application was also informal; it ought to have been made on notice for special leave, instead of which the trustees claimed to vote as of right.

SIR W. PAGE WOOD, L.J.:—

No doubt the Commissioner proceeded upon the analogy of the practice which existed as to a trustee and *cestui que trust* voting for assignees. But I think this should be treated as a distinct question.

The case of *Ex parte Cadwallader* (4) was very similar to this in the mode in which it came before the Court of Appeal. The creditor had obtained special leave to prove, and then claimed to vote for the assignees. The Commissioner decided that he had no right to vote. In the present case, the trustees were admitted to prove, and it must be taken that they made an application to the Commissioner for leave to vote on the resolution—for this is clearly the effect of the minutes of the proceedings—and the Commissioner refused them permission. What then was the position of the trustees? They were engaged in the coal trade on behalf of themselves and other persons. Their claim was on bills of exchange for coals supplied. They had powers of management, and many things had to be done with the money before it came into the hands of the *cestuis que trust*. It appears to me that this is a stronger case than *Ex parte Cadwallader*. For in the case of voting on the choice of assignees it might be said, that as the assignees are officers of the Court, and would see justice done, it was not so important that all the

(1) 1 Glyn. & J. 127.
(2) 2 D. & Ch. 211.
(3) Page 826.
(4) 31 L. J. (Bkcy.) 66.

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creditors should have a voice in the selection. But here the question is whether the trustees are to be obliged to accept a sum of money as a composition for their debt, and it is right for their own protection that they should have a vote. The order appealed from must be discharged; but as the Commissioner followed former authorities, we can give no costs.

SIR C. J. SELWYN, L.J.:—

I also think that the claim of the Appellants to vote on a resolution under the 110th section is stronger than a claim to vote on the choice of assignees, or to sign a bankrupt's certificate under the old law. The certificate was the act of the Court, but this resolution is intended to put a stop to all the proceedings in bankruptcy against the wishes of the minority. It was said on behalf of the bankrupt, that the trustees ought to have made a formal application for leave to vote, but it appears from the proceedings, that they did apply to vote and that the other parties objected to their being allowed to do so, and the Commissioner at once decided that they were not authorized to take any further part in the proceedings. I think they were entitled to vote on this resolution, and that the order must be discharged; but without costs.

Solicitors for the Appellants: Messrs. *Torr, Janeway, & Tagart*, agents for Mr. *A. Henderson, Bristol.*

Solicitors for the Bankrupt: Messrs. *Jones & Blaxland*, agents for Messrs. *Abbot & Leonard, Bristol.*

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ACCEPTANCE OF SHARES—*Qualified Acceptance—Contributory.*] *R.* being desirous of being appointed local manager for a joint stock banking company, was informed by the agent of the company that it would be a condition of his appointment that he should take 100 shares. He accordingly filled up an application for 100 shares in the usual form, which the agent forwarded to the directors with a letter from himself stating that the application was made on condition of *R.'s* being appointed local manager. The shares were allotted to him, but in consequence of his not being able to pay the deposit the directors refused to give him the appointment:—

Held, that *R.'s* application for shares was conditional, and that he did not become a shareholder in the company.

H. being desirous of a similar appointment, made an application in the usual form for fifty shares, through the company's agent, but no letter was sent to the directors stating that the application was conditional on *H.* obtaining the appointment. The shares were allotted unconditionally to *H.*, who afterwards declined the appointment, but did not formally repudiate the shares:—

Held, that the application for shares was unconditional, and that he became a shareholder in the company.

Orders of *Stuart*, V.C., affirmed.

In re UNIVERSAL BANKING COMPANY. ROGERS' CASE. HARRISON'S CASE 633

2. ———— *when complete—No Notice of Allotment—Entry on Registry—Contributory—Director.*] *L.* applied for 1000 shares in a company, as trustee for *M.*; no letter of allotment was sent to *L.*, but his name was put upon the register in respect of those shares and advertised as a director; he attended a meeting of directors, and took no steps to have his name removed for two years:—

Held, that he was a contributory in respect of the 1000 shares.

Order of *Stuart*, V.C., affirmed.

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3. ———— *when complete—Notice of Allotment—Contributory—Application—Entry on Registry.*] Where a person applies for shares in a company, and shares are allotted to him, he will not be constituted a member of the company unless he has notice of the fact of the allotment. It is not, however, necessary that there

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should be a formal notice sent to him, if it appears that he was made aware that the company had accepted his application. The mere entry of his name on the register of shareholders is not sufficient for this purpose.

The decision of *Stuart*, V.C., affirmed.

Bloxam's Case (33 Beav. 529; 33 L. J. (Ch.) 574), and *Cookney's Case* (3 De G. & J. 170), distinguished.

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4. ACCEPTANCE OF SHARES *when complete—Company—Contract to take Shares—Notice of Allotment necessary.*] *S. & C.* agreed with the directors of a company to become agents for the company on certain terms, one of which was that *S. & C.* should subscribe for shares of the company to the amount of £600, and duly pay the instalments and calls thereon. *S. & C.* never applied for shares, but about ten months afterwards the directors passed a resolution allotting them shares to the amount of £600, and placed them on the register as holders of those shares, but no notice was given to *S. & C.* of the allotment or registration until after an order had been made for winding up the company:—

Held, that *S. & C.* did not become the equitable owners of, or liable to be placed on the register as holders of, any shares, until the fact of the allotment was communicated to them; and that as no such communication was made before the winding-up, they were not contributories, and were entitled to have the register rectified by removing their names from it.

In re ANGLO-DANISH AND BALTIC STEAM NAVIGATION COMPANY. SAHLGREEN & CARRALL'S CASE 323

5. ———————— *when complete—Delay in making Allotment—Refusal to accept.*] On the 6th of October, 1865, *B.* saw the prospectus of a company which proposed to start without the delay of a day, and to allot shares on the 14th of October, and he thereupon applied for and paid the deposit on ten shares. The company was registered in December, and then issued a different prospectus, which was sent to *B.* in January. On the 3rd of February he received notice that ten shares had been allotted to him, and on the 7th of February he wrote to decline them, and asked for a return of his deposit, which was refused. After this he made no application to have his name taken off the register until December, 1867, when a call had been made:—

Held, that after the delay in allotting the shares, *B.* was not bound by his application to take them; and that he was not prevented by his subsequent delay from having his name struck off the register.

Order of *Wood*, V.C., affirmed.

In re BOWRON, BAILY, & Co. *Ex parte* BAILY 592

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See PRIVATE CHARITY.

ACCUMULATIONS *by operation of Law—Thellusson Act* (39 & 40 *Geo.* 3, *c.* 98)—*Portions—Provision for Debts—Bond Debt—Interest charged in excess of Penalty.*] A testator directed that his trustees should apply as much as might be necessary of the income of his residuary personal estate for the maintenance of his son (a lunatic) for life, and upon further trust to invest any surplus, and to treat it as part of the tes-

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tator's personal estate: and after his son's death he gave his personal estate to his son's children, and in default of issue to two other persons.

By a codicil he directed that two bond debts, and all other debts which should be due from *B. S.*, one of the residuary legatees, should not be payable unless and until his share of the residue should become vested, and that the amount of the debts and interest should then be deducted from his share.

Shortly after the date of this codicil *B. S.* gave the testator a bond for £8000, conditioned to be void if *B. S.* should pay £4000, with lawful interest, within three months after his taking an absolute interest in a moiety of the residue, his interest being contingent during the life of the testator's son. *B. S.* lived to acquire an absolute vested interest:—

Held (affirming the decision of *Stuart*, V.C.), first, that there was an express direction to accumulate, and that the accumulations beyond the period of twenty-one years from the testator's death were void, and belonged to the testator's next of kin.

Secondly: That the accumulations were not within the exceptions in the *Thellusson Act* respecting portions for children or provision for debts:

Held, also (reversing the decision of *Stuart*, V.C.), that *B. S.* must be charged with the full amount of interest on the first two bonds from their respective dates, although the amount of interest, together with the principal, exceeded the penalty of the bonds:

But *held*, that on the third bond he was chargeable with interest only from the time when he acquired a vested interest in the residue.

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ADDING TO DECREE—15 *&* 16 *Vict. c.* 86, *s.* 42, *rule* 8—*Practice—Appeal from Order adding to Decree.*] An order adding to a decree under 15 & 16 Vict. c. 86, s. 42, rule 8, does not form part of the decree so as to require a petition of appeal to vary it; but may be appealed from by motion.

An addition to a decree cannot be made under the above rule, except as to something raised upon the pleadings.

The allowing proceedings to go on for a length of time under directions added to a decree, is not a bar to appealing against the order making the addition, but makes it incumbent on the Appellant to shew that there is a substantial error in the addition, and is to be considered on the question of costs.

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ADMINISTRATION—Marshalling between pecuniary legatee and residuary devisee 420
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ADVANCEMENT—*Setting up in Business—Married Daughter—Payment of Husband's Debts—Trustees refusing Accounts and Information—Costs.*] A power of advancement for setting up the children of the

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testator in business will not justify trustees in advancing the share of a married daughter for the purpose of paying her husband's debts.

But where a share was advanced for the purpose of setting up a married daughter in a farming business, her husband covenanting that the business should be for her separate use :—

Held, that this was a good execution of the power.

Where trustees had refused information and an account of the property to the Plaintiffs, who had an interest in the estate, and other proceedings had subsequently been taken whereby the costs of the suit were greatly increased, the trustees were directed to pay the costs of the suit up to the hearing, as if it had been an ordinary administration suit, and as to the rest of the costs each party to bear his own.

The decree of *Malins*, V.C., varied.

TALBOT *v.* MARSHFIELD 622

ADVANCING APPEAL *from Order on Demurrer.*] An appeal from an order overruling a demurrer will generally be advanced, if the right to an injunction is involved, but there is no rule that it should be advanced in other cases.

LONDON, CHATHAM, AND DOVER RAILWAY COMPANY *v.* IMPERIAL MERCANTILE CREDIT ASSOCIATION 231

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AFFIDAVIT, WITHDRAWAL OF—*Practice.*] After an affidavit has been read at the hearing of a matter, it cannot be withdrawn without the consent of the other party.

PROLE *v.* SOADY 220

AGREEMENT BY LETTERS—*Agreements made up of several Writings—Reference to other Writings—Statute of Frauds—Specific Performance—Uncertainty.*] A tenant applied to the landlord's solicitors as to the renewal of his lease. The solicitors sent him a report by a surveyor, who recommended the granting a lease for fourteen years at a given rent if certain repairs were done by the tenant. The tenant wrote back assenting to the repairs and rent, but asking for a term of twenty-one years. No final agreement was come to, but some months afterwards a negotiation having proceeded between the tenant and landlord without the intervention of the solicitors, the landlord wrote a letter promising the tenant a lease for fourteen years "at the rent and terms agreed upon," to which the tenant wrote back an unqualified acceptance :—

Held, that parol evidence was admissible to connect the report and the tenant's previous letter with the subsequent letters; and that it being conclusively established that there had never been any other rent or terms agreed upon than those mentioned in the report, there was a sufficient memorandum in writing to satisfy the *Statute of Frauds.*

The report provided for the tenant doing certain specified works and "other works" upon the property, and estimated the expense at from £150 to £200. The specified works being such as must evidently cost nearly that sum :—

Held, that there was no such uncertainty as to prevent specific performance.

Decree of *Stuart*, V.C., affirmed.

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AGREEMENT FOR LEASE BY RAILWAY COMPANY—*Ultrà Vires —Statutory Confirmation of Agreement.*] An Act of Parliament empowered one railway company to grant, and another company to accept, a lease of a railway upon such terms as should be agreed upon, provided that the power to lease should not arise till the Board of Trade had certified that it had been proved to their satisfaction that half the capital of the leasing company had been raised, and applied for the purposes of their Acts; and it was also provided that no lease should be of any effect unless previously sanctioned by three-fifths of the shareholders of each company voting at a special meeting:—

Held, that no lease, or binding agreement for a lease, could be made before the certificate had been obtained.

Heads of agreement for a lease were sanctioned by majorities of three-fifths at meetings of the two companies without any certificate of the Board of Trade being obtained, and were acted upon for several years, but no formal lease, or agreement for a lease, was ever executed. The heads of agreement were also invalid as providing for payment of the rent out of profits not so applicable:—

Held, that the arrangement was not ratified by references to it in subsequent local and personal Acts of Parliament not expressing any direct intention to confirm it.

Decree of *Stuart*, V.C., affirmed.

KENT COAST RAILWAY COMPANY *v.* LONDON, CHATHAM, AND DOVER RAILWAY COMPANY 656

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See ACCEPTANCE OF SHARES. 2, 3, 4.

AMENDMENT BY ADDING PARTIES—*Amendment at the Hearing —Adding Co-Plaintiffs—Misjoinder—Practice.*] The sole Plaintiff in a creditor's administration suit alleged that she was the personal representative of a creditor of the testator. At the hearing it appeared that the Plaintiff was not his representative; and she then applied for leave to amend the bill by adding the true representatives as co-Plaintiffs with her, and by inserting allegations to shew that she had a beneficial interest in the debt which was the foundation of the suit.

The Court (affirming the order of the Master of the Rolls) gave leave to make the amendments; and it was held that, although the original Plaintiff was herself an accounting party to the creditor's estate, there was no misjoinder in joining her as co-Plaintiff with the legal personal representatives.

In the original bill the personal representative of the testator whose estate was sought to be administered was made a Defendant in another capacity; but there was no statement that she filled the character of personal representative. Leave was given at the hearing to amend the bill by alleging her title as such representative.

MAUGHAN *v.* BLAKE 32

2. ——— ——— *Order ex parte, without Evidence.*] Plaintiffs, on behalf of themselves and all the tenants of a manor, filed a bill against the lords of the manor to have the rights of the tenants over uninclosed lands declared. After the expiration of four weeks from the time when the answer became sufficient, the Plaintiffs obtained, *ex parte*, without evidence, an order for leave to add a certain company as Defendant, with apt words, and all necessary allegations. They amended the bill by making the company a party, and alleging that the lord of the manor had sold part of the lands to the company, and that the company was inclosing them:—

Held, that the order was irregularly obtained, and must be discharged, and the amendments expunged.

WARRICK *v.* QUEEN'S COLLEGE, OXFORD 815

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ANNUITY FOR JOINT LIVES OR LIFE OF SURVIVOR—*Will—Survivorship.*] Bequest of an annuity of £100 to the child or children of *J. B.* equally, share and share alike, for and during the term of their joint natural lives, or the life of the survivor of them, or longer liver of them :—

Held (affirming the decision of *Malins*, V.C.), that the children took as tenants in common, without benefit of survivorship, an annuity to last till the death of the survivor, and that the shares of those dying within that period went to their personal representatives.

BRYAN *v.* TWIGG 183

ANNULLING ADJUDICATION—*Consent of Creditors—Bankruptcy Act*, 1861, *ss.* 110, 185.] The power of the Court of Bankruptcy to annul an adjudication with the consent of all the creditors who have proved may be exercised without resorting to the procedure under the 110th and 185th sections of the *Bankruptcy Act*, 1861; and that power may be exercised in a suitable case after the first meeting of creditors.

Semble, the Court may on sufficient grounds refuse to annul, though all the creditors who have proved assent to the application.

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ASSENT OF CREDITORS—*Creditors' Deed—Date at which Creditors to be ascertained—Holders of negotiable Instruments.*] A debtor executed an inspectorship deed by which it was provided that, in the case of debts due from him on negotiable instruments, either the original holder, or the present or ultimate holder, or any intermediate indorsers, might execute or assent to the deed, but that the ultimate holder should be deemed the creditor and party to the deed. The debtor was liable on acceptances on bills drawn by *S.*, who was returned as an assenting creditor in respect of them; but, in fact, *S.* was, at the time of the registration, the holder of only a small part of those bills, the rest being in the hands of his bankers, who had discounted them. After the registration all the bills came into the hands of *S.*:—

Held, that the bankers were the proper parties to have been returned as creditors in respect of the bills in their hands, and that *S.* had no right to assent in respect of his contingent liability as drawer; and, as striking out of these bills turned the scale of assents and dissents, the deed was void.

The bills having been given in respect of a speculation the result of which was not ascertained, it was held that *S.* could not be deemed a creditor in respect of his estimated loss in the transaction.

The registration, not the execution, of the deed is the period at which the relative position of the creditors is to be ascertained.
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———— Service on absconding debtor 252
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BANKRUPTCY APPEAL—*Practice—Affidavit of Service—Notice of Appeal.*] The practice on appeal motions in bankruptcy is similar to the practice on motions in Chancery. Therefore where an Appellant in bankruptcy desires to take an order in the absence of the Respondent, he must produce an affidavit of service of the notice of motion before the rising of the Court.

Two clear days' notice of an appeal motion in bankruptcy is sufficient.

Ex parte ROCHE. *In re* BICKERSTAFF 238

———— Appeal to House of Lords—Leave to appeal 252
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BOND DEBT—Interest on, in excess of penalty 691
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BUILDING SOCIETY, *Mortgage by*—6 & 7 *Will.* 4, c. 32, s. 5—*Second Mortgage—Priority—Tacking.*] A member of a building society having made a mortgage to the trustees of the society and a subsequent equitable charge in favour of the Plaintiffs, requested the Defendants to pay off the first mortgage. This was done, and the receipt of the trustees was indorsed upon the first mortgage and the title deeds handed over to the Defendants, and the mortgagor at the same time executed a mortgage of the property to the Defendants, who had no notice of the Plaintiffs' charge:—

Held (reversing the decision of the Master of the Rolls), first, that the Defendants had the better equity, and therefore that the rule, "*Qui prior est tempore, potior est jure*" did not apply. Secondly, that on the satisfaction of the first mortgage the legal estate in the property was vested, by virtue of the 5th section of the 6 & 7 Will. 4, c. 32, either in the original mortgagor or in the parties who had the best right to call for it; in either of which cases it had passed to the Defendants.

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The Defendants at the time of paying off the first mortgage made a further advance, which was included in the mortgage to them :—
Held, that they were not entitled to tack this.
PEASE *v.* JACKSON 576

BEQUEST OF RESIDUE *to Five as Tenants in Common—Bequest as to One revoked, and Legacy substituted—Will—Codicil.*] A testator, by his will, gave his residuary real and personal estate to trustees upon trust for his five sons as tenants in common, and by a codicil revoked and made void all the trusts in his will contained concerning his residuary estate, so far as the same trusts related to his son *R.*, or his interest therein, and in lieu thereof gave a pecuniary legacy upon trust for *R.*, his wife and children, and if *R.* should have no children, he directed that the said legacy should sink into the residuary estate, but so that *R.* or his representatives should not take any share or interest therein :—
Held, that the testator died intestate as to the trusts of one-fifth share of his residuary estate, and that the legacy was payable out of the residuary estate and not out of the share which was undisposed of.
SYKES *v.* SYKES 301

CAIRNS' ACT—Right to trial by jury—Patent suit 417
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———, Interest on—3 & 4 Will. 4, c. 42 784
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Inman v. *Clare* (Joh. 769) observed on 753
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King of the Two Sicilies v. *Willcox* (1 Sim. (N.S.) 301) observed on 79
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Lister's Hospital, In re (6 D. M. & G. 184) observed on 800
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McKerrow, Ex parte (13 W. R. 1002) followed 610
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Marsh v. *Attorney-General* (2 J. & H. 61) observed on 672
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Mordaunt v. *Hooper* (Amb. 311) observed on 719
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Warburton v. *Hill* (Kay, 470) explained 452
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See NOTICE OF ASSIGNMENT.

CERTIORARI—Writ of—Lord Mayor's Court 200
See LORD MAYOR'S COURT.

CHARGE—Legacy on real estate—General bequest in residue—Revocation by codicil 584
See REVOCATION BY CODICIL.

CHARGING ORDER—1 *& 2 Vict. c.* 110, *s.* 15—*Charging Order Nisi made absolute after Administration Decree—Injunction.*] A creditor recovered judgment against his debtor and issued a *fi. fa.* Shortly afterwards the debtor died. The creditor entered a suggestion on the record, entitling him to have execution against the executrix, and obtained a charging order *nisi* upon shares belonging to the debtor. After the order *nisi* had been obtained, but on the same day, a decree was made for administration of the debtor's estate. The order *nisi* not having been made absolute, the Plaintiff in the administration suit applied for an injunction to restrain further proceedings by the judgment creditor :—

Held (affirming the decision of *Malins*, V.C.), that an injunction ought not to be granted.

A charging order, when made absolute, operates from the making of the order *nisi*.

Warburton v. *Hill* (Kay, 470) explained.

HALY *v.* BARRY 452

"CHARITIES AND OTHER PUBLIC PURPOSES IN T."—*Will—Charitable Legacy.*] Bequest of personalty "for such charities and other public purposes as lawfully might be in the parish of *T.*" :—

Held, a good charitable gift.

Order of the Master of the Rolls affirmed.

DOLAN *v.* MACDERMOT 676

CHARITY—"Charities and other public purposes in T" 676
See "CHARITIES AND OTHER PUBLIC PURPOSES IN T."

——————— Consent of Charity Commissioners—Suit for establishment of charity 800
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——————— Private—Power of Charity Commissioners 543
See PRIVATE CHARITY.

———————, Secret trust for 362
See SECRET TRUST.

CHARITY COMMISSIONERS, *Consent of—Suit for establishment of*

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a Charity—Want of Interest in Plaintiffs—Demurrer.] A testator gave his pure personal property to trustees upon trust to found and support a school for the gratuitous education of boys; the preference to be given to the lineal descendants of his grandfather. A bill was filed by three of the lineal descendants against the trustees and executors praying for the administration of the estate, and that provision might be made for their education:—

Held (reversing the decision of *Stuart*, V.C.), that the consent of the Charity Commissioners was necessary before the institution of the suit; and a demurrer on the ground that it did not appear that such consent had been given, was allowed.

Whether in such a case an information ought to have been filed—*quære.*

In re Lister's Hospital (6 D. M. & G. 184) distinguished.

BRAUND *v.* EARL OF DEVON 800

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CHIEF REGISTRAR'S ACCOUNT—Costs of prosecuting bankrupt—Appeal 259, 408

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CHOICE OF ASSIGNEES—*Right of Creditors under* £10 *to vote—Bankruptcy Act*, 1849, *s.* 139—*Bankruptcy Act*, 1861, *s.* 116.] Sect. 139 of the Bankruptcy Act, 1849, so far as it confines the right of choosing an assignee to creditors whose debts amount to £10 or upwards, is repealed by sect. 116 of the Act of 1861, which gives all the creditors a right to vote.

Ex parte Moss. *In re* COOPER 29

CHOSE IN ACTION OF WIFE—*Reduction into Possession—Pre-nuptial Contract—Divorce—Practice—Withdrawing Affidavit.*] A woman being entitled to a fund in Court, applied shortly before her marriage for a loan on the security of the fund. Before the transaction was completed she married, and the money was then advanced to her husband, who joined with his wife in assigning the fund by way of mortgage. The fund was then carried over to the joint account of the husband and wife, and a stop order put upon it in favour of the mortgagee. In June, 1867, a decree *nisi* for dissolution of marriage was pronounced by the Divorce Court, which became absolute in January, 1868. In the interval the mortgagee presented a Petition, on which an order was made by *Stuart*, V.C., in November, 1867, for payment of his debt out of the fund in Court:—

Held, first, that the mortgage by the husband and wife did not bind the wife's right by survivorship, and that the pre-nuptial negotiation by the wife made no difference:

Secondly, that the carrying over the fund to the account of the husband and wife was not a reduction into possession by the husband:

Thirdly, that on the decree for dissolution of marriage becoming absolute, it took effect from the date of the decree *nisi*, and consequently the order made in the interval on the Petition was of no avail to reduce the fund into possession.

The order of *Stuart*, V.C., reversed.

After an affidavit has been read at the hearing of a matter, it cannot be withdrawn without the consent of the other party.

PROLE *v.* SOADY 220

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CODICIL—Revocation of specific legacy by general gift 584
See REVOCATION BY CODICIL.

COMMITTEE OF LUNATIC—*Liability to account.*] Where an annual sum of money is ordered to be paid to the committee of the person for the maintenance of a lunatic, the committee is not bound to keep accounts, and, as a general rule, will not be ordered to account.

But the committee may be ordered to account under special circumstances, as when the lunatic has been improperly maintained, or the sum allowed has clearly not been expended.

Where a committee had received one allowance for the maintenance of a lunatic and another for the maintenance of her infant children, and had, after properly maintaining the lunatic, spent the remainder of her allowance on the maintenance of the children:—

Held, that he would not be ordered to account on the Petition of the children.

In re FRENCH 317

——————— Estate of deceased lunatic—Adverse claimants 175, 719
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———— Subdivided shares 131
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———— Supervision order, when to be made—Voluntary winding-up 15
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CONFIRMATION, Statutory, of agreement for lease by railway company 656
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CONFLICT OF LAWS—Proceedings against ship—*Louisiana* 479
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CONSENT OF CREDITORS—Bankruptcy—Annulling adjudication .. 144
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CONTRACT TO TAKE SHARES—When complete .. 36, 40, 633
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CONTRIBUTORY—Acceptance of shares 36, 40, 323, 592, 633
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——— Undertaking as to—Appeal from order in Chambers or on motion 428
See FIAT ON PETITION.

——— Winding-up—Costs of realizing assets 167
See MARSHALLING. 3.

COUNTY PALATINE—Appeal from Court of 513
See LORD JUSTICE SITTING ALONE.

COVENANT NOT TO ASSIGN *without License—Proviso that License not to be refused unreasonably—Lease—Specific Performance—Continual Claim.*] A lease contained a covenant by the lessee not to assign without license; and the lessor covenanted not to refuse his license unreasonably or vexatiously.

The lessee contracted to assign his lease to the Plaintiff "subject to the landlord's approval." The lessor on being applied to for his license refused to give it, not from any personal objection to the proposed assignee, but because he wished himself to buy up the lease in order to rebuild the premises. The lessee having failed to obtain the lessor's license, surrendered the lease to the lessor for the same price for which he had agreed with the Plaintiff.

In a bill by the Plaintiff against the lessor and lessee for specific performance of the contract to assign the lease to him:—

Held, that the reference to the landlord's approval in the contract did not throw upon the lessee the duty of taking legal proceedings to oblige the lessor to give his license; and that having used all reasonable efforts to induce the lessor to consent, he was at liberty to consider the contract at an end and make his own terms with the lessor.

Whether the refusal on the part of the lessor under the circumstances was unreasonable and vexatious, *Quære*.

A continual claim without any active steps in support of it will not keep alive a right which would otherwise be barred by laches.

Decree of *Stuart*, V.C., for specific performance reversed, and bill dismissed with costs.

LEHMANN *v.* MCARTHUR 496

COVENANT TO SETTLE, by reference to other uses 614
See POWER, GENERAL.

CREDITOR HOLDING SECURITY—*Winding-up—Companies Act*, 1862.] When a company is being wound up under the *Companies Act*, 1862, a creditor holding security is entitled to prove for the whole amount that is due to him, and not merely, as in Bankruptcy, for the balance remaining due after realizing or valuing his security.

A secured creditor is entitled to prove for the amount due at the time when his claim is sent in, without regard to securities which

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have been realized by him between the sending in his claim and its being adjudicated upon.

In re BARNED'S BANKING COMPANY. KELLOCK'S CASE. *In re* XERES WINE SHIPPING COMPANY. *Ex parte* ALLIANCE BANK 769

CREDITORS' DEED — Appeal of creditors—Holder of negotiable securities 232

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——————— Date of ascertaining creditors—Registration 232

See ASSENT OF CREDITORS.

——————— Dividend—Jurisdiction of Court to order payment 258

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——————— Receiver—Jurisdiction of Court to appoint 820

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——————— Unreasonableness—Omission of debt from schedule 10

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CRIMINAL CHARGE—Offences under Copyright Act—Creditors' deed 642

See DISCHARGE FROM PRISON. 2.

CUSTOM OF STOCK EXCHANGE—*Sub-purchaser—Privity—Transfer—Pleading.*] The Plaintiff, a holder of shares in a public company, agreed through his broker to sell them to a jobber for £202 10*s.* By the usage of the *Stock Exchange*, the transfer of the shares would not be made until a future day, and in the interval the shares might be again sold until a certain day, when the original buyer must name the person to whom the transfer was finally to be made. Accordingly, the shares were ultimately sold to the Defendant for £145 (a call having been made in the meantime), and the Plaintiff executed and gave to the Defendant a deed transferring the shares to him, the consideration named in which was £145—the difference being paid to the Plaintiff by the jobber. The Defendant never registered the transfer, and an order was made for winding up the company. The Plaintiff was compelled to pay calls upon the shares, and filed a bill for specific performance and repayment, alleging that there had been a purchase by the Defendant for £202 10*s.*:—

Semble, that, under the circumstances, there was a contract between the Plaintiff and the Defendant.

Held (reversing the decree of *Wood*, V.C.), that the fact of the call having been made in the interval did not invalidate the contract:

But *held*, that the contract alleged by the bill was not proved.

Appeal dismissed.

HAWKINS *v.* MALTBY 188

2. ——————— *Contract for Purchase of Shares—Specific Performance.*] The Plaintiffs, who were dealers in shares, contracted to sell to the agents of the Defendant shares which they had purchased from, and which remained registered in the name of, *C.* On the settling-day the agents of the Defendant gave his name to the Plaintiffs as transferee, and *C.* executed transfers to him. The Defendant made no objection to the form of the transfers till more than a month afterwards, when he urged that he had never intended to have the shares registered in his own name, as he had bought them on account of other parties, and without any guarantee being given that he should be registered. A bill for specific performance

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was thereupon filed, and some months afterwards an order was made for winding up the company:—

Held (affirming the decree of *Stuart*, V.C.), that the Plaintiffs were entitled to a decree for specific performance and indemnity.

PAINE *v.* HUTCHINSON 388

3. CUSTOM OF STOCK EXCHANGE—*Substituting another Person's Name as Transferee—Acquiescence of Transferee.*] The Plaintiff sold shares in a company, through a broker, to *W.*, who was the managing director of the company. On the settling-day the broker, by *W.'s* instructions, gave the name of *G.* as the real purchaser, and the transfers were made out to *G.* and sent to him. *W.* also passed a cheque on the company's bankers for the amount of the purchase-money to the debit of *G.*, and informed *G.* what he had done. *G.* refused to execute the transfers, but did not inform the Plaintiff, or return the transfers, but retained them till the company was wound up, and then handed them to the secretary as a security for the money carried to his debit:—

Held (affirming the decree of *Stuart*, V.C.), that the Defendant *G.* was precluded by his conduct from denying that he was the purchaser of the shares, and that he was bound to indemnify the Plaintiff against the calls, and to pay the costs of the Plaintiff and *W.*

SHEPHERD *v.* GILLESPIE 764

CY-PRÈS—*Will—Estate Tail—Rule in Shelley's Case—Practice—Special Case—Jurisdiction as to future Rights*—13 & 14 *Vict. c.* 35, *ss.* 11, 14.] A testator declared his will to be, that his property be inherited by his nephews, *C.* and *T.*, and the sons of his late brother *A.*, during their lives, and after the decease of *C.* and *T.* that the eldest son of *C.* and the eldest son of *T.* inherit the said property during their lives, and so on, the eldest son of each of the two families to inherit the same for ever; and that each two of the succeeding inheritors should inherit the said property free from incumbrances:—

Held (reversing the decision of *Stuart*, V.C.), that *C.* and *T.* took estates for their lives, with remainder to their eldest sons respectively for their lives, with remainder to *C.* and *T.* in tail male.

Where the interests of the parties to a special case were not of such a nature as to give the Court jurisdiction to decide the questions asked in the case, the Court gave permission to amend the case by introducing a question as to the right of the Plaintiffs to commit waste in order to give the Court jurisdiction.

FORSBROOK *v.* FORSBROOK 93

DAMAGES UNDER CAIRNS' ACT—*Practice.*] The Court under the 21 & 22 Vict. c. 27, can direct an account and award damages in the same suit.

BETTS *v.* NEILSON 429

DEBENTURE—Payable to bearer 154

See DEBENTURE PAYABLE TO BEARER.

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See DEBENTURE PAYABLE TO HOLDER.

——————— Payable to order 758

See DEBENTURE PAYABLE TO ORDER.

DEBENTURE PAYABLE TO BEARER—*Assignment of Chose in Action—Whether subject to Equities—Company.*] *B.* and *D.* agreed in writing with the promoter of a company to sell their business to the company when formed, part of the purchase-money to be paid in debentures of the company payable to bearer. The articles of asso-

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ciation adopted this agreement, and directed it to be carried into effect. The directors accordingly gave to *B.* and *D.* debentures under the seal of the company, by each of which the company covenanted to pay the sum therein mentioned to "*B.* and *D.*, their executors, administrators, and assigns, or to the bearer hereof." Some of these debentures were passed by delivery to *Z.*, who was a *bonâ fide* holder for value:—

Semble, that the debentures could not at law be sued upon by the bearer in his own name, and *quære*, whether they were good at law as bonds or not; but *held*, that as they were conformable to the agreement between *B.* and *D.* and the promoter, which had been made binding on the company, effect must be given to them in equity according to their tenor:

Held, accordingly (affirming the decision of the Master of the Rolls) that in the winding up of the company, *Z.* could prove on these debentures in his own name, without being subject to any equities existing between the company and *B.* and *D.*

In re BLAKELY ORDNANCE COMPANY. *Ex parte* NEW ZEALAND BANKING CORPORATION 154

DEBENTURE PAYABLE TO HOLDER—*Assignment of Chose in Action.*] A company gave to *C.* debentures, by each of which the company undertook to pay to "*C.*, or to his executors, administrators, or transferees, or to the holder for the time being of this debenture bond," the sum therein mentioned, with interest. These debentures were given in pursuance of an agreement which provided that part of the price of land sold by *C.* to the company should be paid in debentures bearing interest, but did not say anything about the form of the debentures:—

Held, that there was nothing in the debentures to take them out of the ordinary rule, that the assignee of a chose in action takes it subject to all the equities between the original parties to the contract; and that the holders of these debentures could only prove on them subject to all equities between the company and *C.*

In re Blakely Ordnance Company (Law Rep. 3 Ch. 154) distinguished.

In re NATAL INVESTMENT COMPANY. CLAIM OF THE FINANCIAL CORPORATION 355

DEBENTURE PAYABLE TO ORDER—*Assignment of Chose in Action —Negotiable Instruments.*] The articles of association of a company contained no provisions as to the issue of negotiable instruments, but the objects of the company were such that a power to issue them was to be implied. The directors gave to *H.* for value an instrument under the seal of the company, headed "debenture," and stamped as a deed, by which the company "undertake to pay to the order of *J. H.*, on 1st July, 1867," £1000, with interest half-yearly, on presentation of the annexed interest warrants:—

Held (reversing the decision of the Master of the Rolls), that the indorsee and transferee for value of this instrument was entitled to prove on it against the company free from equities between *H.* and the company.

Per Wood, L.J., *semble* the instrument was a promissory note, but, if not, the company were bound by their promise, publicly held out by the instrument, that they would pay to the order of *H.*, and could not set up against a transferee equities between themselves and *H.*

Per Selwyn, L.J., the instrument was a promissory note.

In re GENERAL ESTATES COMPANY. *Ex parte* CITY BANK .. 758

DEBTS OF HUSBAND—Payment of, not advancement] of married daughter 622

See ADVANCEMENT.

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DEBTS WITHOUT EXPECTATION OF PAYMENT—*Bankruptcy Act*, 1861, *s.* 159.] In order to subject a bankrupt to the penalties of the *Bankruptcy Act*, 1861, s. 159, as having contracted debts without reasonable expectation of being able to pay the same, it must be shewn that there are particular subsisting debts which at the time when they were contracted he could not reasonably have expected to be able to pay, and it is not enough to shew that he contracted in the aggregate a greater amount of debts than he could reasonably expect to pay.

Ex parte BRUNDRIT. *In re* CALDWELL 26

2. ——— *Discretion of Commissioner—Bankruptcy Act*, 1861, *s.* 159.] Two young men took to a family business of calico printing which was at the time insolvent. They carried it on upon a large scale from November, 1864, to June, 1867, without taking stock. At the end of that time they took stock, and found that the result of their business was a loss of £10,000 for the whole period. Upon this they called their creditors together and became bankrupt. Up to that time they deposed that they had believed they were carrying on business at a profit. One of them, however, admitted that in January, 1867, he had believed the firm insolvent. From January to June the excess of liabilities over assets had increased by £4000, and many debts contracted during that period, chiefly for drugs employed in the printing, remained unpaid. The Commissioner considered that the bankrupts had contracted these debts without reasonable expectation of being able to pay them, and suspended the order of discharge for three months, with protection. The assignee appealed, asking for a heavier sentence :—

Held, by Lord *Cairns*, L.J., that the bankrupts ought to have stopped trading sooner, but that this was not a punishable offence, and that there was not sufficient ground for holding that they had contracted debts without reasonable expectation of being able to pay them :

Held, by *Rolt*, L.J., that, assuming the bankrupts to have contracted debts without such reasonable expectation, the circumstances of the case were not such as ought to induce the Court to interfere with the discretion of the Commissioner by aggravating the sentence. Whether the debts had been contracted without reasonable ground of expectation of being able to pay them *quære*.

Ex parte BAYLEY. *In re* AINSWORTH 244

DECEASED LUNATIC—*Jurisdiction—Possession of Real Estate—Committee—Receiver—Title Deeds.*] After the death of a lunatic there is no jurisdiction in Lunacy to interfere between adverse claimants to the real estate of the late lunatic, although there is jurisdiction to restrain the committee of the estate from taking advantage of his position to assert his own claims as heir-at-law, or to prejudice the rights of adverse claimants.

Therefore, where two rival claimants had filed bills praying for a receiver of the real estates pending the decision of their rights, and then presented Petitions in Lunacy for the appointment of a receiver, the Court refused the application in Lunacy, and also declined to exercise its original jurisdiction in Chancery for that purpose, upon an interlocutory application in the suits.

But the Court made an order in Lunacy for the deeds to be retained in the Master's office for inspection by the claimants.

In re FERRIOR (A LUNATIC). CARROW *v.* FERRIOR. DUNN *v.* FERRIOR 175

2. ——— *Receiver—Adverse Legal Titles—Alleged Vacant Possession—Breach of Interim Order.*] A lunatic seised of real estate died intestate, and it had not been found who was her heir-at-law. *F.*, *C.*, and *D.* respectively claimed the property as

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heirs. After the death of the lunatic, the gentleman who had acted as the solicitor of the committee, introduced *F.* to some of the tenants as being the heir, but the committee took no part in this. *C.* and *D.* severally filed bills against *F.* for the appointment of a receiver. *C.* moved for a receiver; and on the 21st of November, 1867, *Malins*, V.C., ordered the application to stand over for *C.* to make an application in Lunacy, and granted an interim order to restrain *F.* from receiving the rents. On the 20th of December the application in Lunacy was refused; and on the same day *C.* moved before the Vice-Chancellor to extend the interim order till the motion should be disposed of before His Honour; and the order was extended accordingly, but *F.* had no notice of this. *F.* accordingly received rents at Christmas. The motion was heard on the 13th of February, 1868, and an order made by the Vice-Chancellor for a receiver, and for *F.* to pay into the hands of stakeholders the rents which he had received:—

Held, on appeal, that the order for payment of the rents to stakeholders ought not to be disturbed, an interim order, as a general rule, remaining in force until the case is disposed of.

But, *held*, that the order for a receiver could not be sustained, the case being merely one where several persons set up adverse legal titles to the property:

Held, that no equity was raised by the circumstance that the person who had been solicitor to the committee was acting as *F.*'s solicitor, and had induced the tenants to attorn to him, nor by the circumstance that some of the tenants had been induced to attorn by *F.*'s granting them leases on very favourable terms.

Semble, that a receiver of real estate will not, in general, be granted as between adverse legal claimants, even though the possession be vacant.

Observations on *Mordaunt* v. *Hooper* (Amb. 311) and *In re Butler* (Law Rep. 1 Ch. 607).

CARROW *v.* FERRIOR. DUNN *v.* FERRIOR 719

DECLARATION AS TO FUTURE RIGHT—*Special Case—Practice.*] Where the interests of the parties to a special case were not of such a nature as to give the Court jurisdiction to decide the questions asked in the case, the Court gave permission to amend the case by introducing a question as to the right of the Plaintiffs to commit waste in order to give the Court jurisdiction.

FORSBROOK *v.* FORSBROOK 93

DECREE—Plea of, before inrolment—Bill to impeach decree for fraud .. 1

See INROLMENT OF DECREE.

——— Fraud in obtaining—Foreclosure 203

See FRAUD, DECREE OBTAINED BY.

DEFECTIVE EXECUTION OF POWER—*When aided in Equity—Power to appoint by Deed within a prescribed Period—Appointment by Will—Will speaking from Death—Power to appoint Proceeds of Sale—Appointment of Estate in Specie.*] A testator gave an estate upon trust for sale, with power of pre-emption to his younger children, and the proceeds were to be held upon such trusts as his widow, by deed or instrument sealed and delivered before the youngest child attained the age of twenty-five years, should appoint, and in default for his children, except the eldest son, equally. The testator's widow, by deed-poll executed within the prescribed period, appointed the proceeds of the estate among all the children equally; but reserved a power of revocation. By her will, which was also executed before the youngest child attained twenty-five, but came into operation by her death after

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the prescribed period, she appointed the estate by name to the eldest son :—

Held, that the will, having come into operation after the prescribed period, could not take effect as a new appointment under the power; and that this was not such a defective execution as would be relieved against in Equity.

Per LORD CAIRNS, L.J. (differing from *Stuart*, V.C.), that if the appointment had been in other respects good, the proceeds of the sale of the estate would have passed under the appointment of the estate.

COOPER *v.* MARTIN 47

DELIVERY OF GOODS of company before winding-up 443
See DISPOSITIONS BEFORE WINDING-UP ORDER.

DEMURRER—Appeal from order on advancing appeal 231
See ADVANCING APPEAL.

———— Charity suit—Want of consent of Charity Commissioners 800
See CHARITY COMMISSIONERS.

DEVISE, RESIDUARY—Whether specific—Marshalling between pecuniary legatee and residuary devisee 420
See MARSHALLING. 1.

DIRECTOR—Acceptance of shares—No notice of allotment 36
See ACCEPTANCE OF SHARES. 2.

DISCHARGE, *after Arrangement with Creditors — Arrangement with Creditors—Resolution to suspend Proceedings—Liability of Bankrupt to Examination—Bankruptcy Act*, 1861, *ss.* 110, 159.] Where the proceedings in a bankruptcy are suspended in consequence of an arrangement with the creditors under the 110th section of the *Bankruptcy Act*, 1861, although the bankrupt, having made a full disclosure of his estate, is entitled to apply for his discharge, yet he is not entitled to his discharge as of course, but must submit to be examined, and is subject to the rules of the 159th section.

Ex parte McKerrow (13 W. R. 1002) followed.

Ex parte PETRIE. *In re* PETRIE. (No. 2.) 610

2. ———— *Bankruptcy—Effect on Claim of Provisional Assignee under previous Insolvency.*] A debtor obtained his discharge under the *Insolvent Act*, 1 & 2 Vict. c. 110, after giving the usual warrant of attorney to the provisional assignee. He afterwards became bankrupt, and obtained his order of discharge under the bankruptcy :—

Held, that his after-acquired property remained liable to the claim of the official assignee for payment of his debts under the insolvency.

Ex parte PAIN. *In re* PAIN 639

3. ———— *Order refusing—Bankruptcy — Jurisdiction to review Order—Bankruptcy Act*, 1861, *s.* 168.] The Court of Bankruptcy has power to review an order refusing the discharge of a bankrupt, although it has no power to review an order granting or suspending the discharge.

Ex parte ATHERTON. *In re* ATHERTON 142

DISCHARGE FROM PRISON—*Bankruptcy Act*, 1849, *s.* 112—*Outlawry —Jurisdiction.*] A creditor obtained judgment against *S.* on a bill of exchange, and not having been able to arrest him under a *ca. sa.*, proceeded to outlawry, and *S.* was arrested under a *capias utlagatum*. *S.*, while in custody under it, was adjudicated bankrupt :—

Held, that *S.* was not "in prison or in custody for debt" within the meaning of the Bankruptcy Act, 1849, s. 112; and that the Court of Bankruptcy had no jurisdiction to order his release.

Ex parte STOFFEL. *In re* STOFFEL 240

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2. DISCHARGE FROM PRISON—*Creditors' Deed—Prisoner in Custody for Offences against the Copyright Act.*] A debtor was convicted under the 6th section of the *Copyright Act* (25 & 26 Vict. c. 68), for violations of copyright in engravings, and sentenced to pay a fine, and in default was imprisoned. After the conviction he executed a deed of composition with his creditors, which was duly registered. He then applied for discharge from prison:—

Held, that the process under which the debtor was arrested was of a criminal nature, and not for a debt, and that he was not entitled to his discharge.

Ex parte GRAVES. *In re* PRINCE 642

DISCOVERY—Adjourning final examination in bankruptcy for the purpose of 150, 152

See FINAL EXAMINATION. 2, 3.

——— Plea to, of penalty under foreign law 79

See PENALTY UNDER FOREIGN LAW.

DISCRETION OF COURT—Appointment of liquidators — Voluntary winding-up 394

See LIQUIDATORS. 1.

——— Commissioner in Bankruptcy 244

See DEBTS WITHOUT EXPECTATION OF PAYMENT. 2.

DISPOSITIONS BEFORE WINDING-UP ORDER — *Companies Act*, 1862, s. 153—*Contract for Sale of Goods—Delivery—Practice—Rehearing on fresh Evidence.*] *Bonâ fide* dispositions of property of a company in the ordinary course of its trade, made after the presenting of a Petition for winding up, and completed before the winding-up order, will, as of course, in the exercise of the discretion given to the Court by the *Companies Act*, s. 153, be confirmed. Where, however, such dispositions are incomplete, and rest in contract at the time of the winding-up order, the Court has no discretionary power to order the contract to be fulfilled, and the person with whom it was entered into, though he has paid his money, has only a general claim as a creditor for damages in respect of the breach of contract.

Where a customer of a trading company had *bonâ fide* ordered and paid for goods, and the company had loaded the goods on a railway to his address, and sent him the invoices, after the presenting of the Petition but before the winding-up order:—

Held, that the disposition of the property was complete before the winding-up order, and the goods ordered to be delivered to the customer.

Leave given to have an appeal reheard, and to adduce fresh documentary evidence on the rehearing.

Order of *Stuart*, V.C., affirmed.

In re WILTSHIRE IRON COMPANY. *Ex parte* PEARSON 443

DISSOLUTION OF MARRIAGE—Wife's chose in action—Wife's right of survivorship—Decree *nisi*, effect of 220

See CHOSE IN ACTION OF WIFE.

DISSOLUTION OF PARTNERSHIP—Return of premium 369

See RETURN OF PREMIUM.

DIVERSION OF FOOT PATH 306

See RAILWAY CLAUSES ACT.

DIVIDENDS, PAYMENT IN PREFERENCE SHARES—*Shareholder's Bill—Parties—Ultrà vires.*] A railway company had power to raise additional capital by the issue of shares, and to allot to them a prefer-

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ential dividend, it being enacted that dividends should not be paid out of any moneys received for the shares, and that no share should be issued until one-fifth of the amount had been paid. The revenue of the company during a particular half-year was sufficient to pay a dividend, after providing for all charges properly payable out of revenue, but, owing to the refusal of creditors of the company to give time, the revenue was absorbed in payment of sums properly chargeable to capital. In these circumstances the company in general meeting sanctioned a plan for offering to each shareholder, at par, preference shares to an amount equal to the dividend which would have been payable to him if the revenue had not been diverted for capital purposes. These shares were saleable, but only at a considerable discount. A shareholder filed his bill, on behalf of himself and the section of shareholders to which he belonged, to restrain the issue of shares for the above purpose, to have those already issued cancelled, and to restrain the payment of dividends on them:—

Held, that the scheme was *ultrà vires*, for, assuming that the shares could lawfully be issued at a discount (an issue under this scheme being in reality an issue at a discount), and assuming that owing to the diversion of the revenue to capital purposes they could lawfully be treated as assets for payment of a dividend, each shareholder who was not willing to accept an allotment of them in specie had a right to insist that the proceeds of the whole should be applied rateably in payment of a dividend to all the shareholders.

An individual member of a corporation may maintain a bill in his own name, without suing on behalf of other persons as well as himself, to restrain the corporation from doing an act which is *ultrà vires*.

Held, that those shareholders who had accepted the shares offered to them according to the above scheme were sufficiently represented for the purpose of these proceedings by one of the directors who had accepted such shares, and had them registered in his name; but, *semble*, the Court would grant no relief affecting the rights of absent shareholders.

Order of *Wood*, V.C., affirmed.

HOOLE *v.* GREAT WESTERN RAILWAY COMPANY 262

DIVIDENDS, PAYMENT OUT OF CAPITAL—*Auditors' Powers—Ultrà vires—Injunction—Bonâ fide Shareholder.*] A railway company whose original line was constructed and at work, obtained powers and money for the construction of an extension line, the shareholders in which were not to have more than 6 per cent. for the first three years, and afterwards were to have their shares amalgamated with the ordinary stock of the company.

The directors had in former half-years charged to capital one-half of the office expenses, and also a sum representing interest on debentures issued for lines in construction; they had also paid interest on the *Extension* share capital out of a sum of money paid by contractors as interest in respect of unfinished lines; and a dividend on the ordinary stock had been declared accordingly:—

Held, by *Wood*, V.C., on the application of a holder of shares in the *Extension* line, that the directors were wrong in all these charges, and that an interlocutory injunction must issue to restrain them from declaring a dividend calculated accordingly.

Held, by Lord *Chelmsford*, L.C., on appeal:—

That whether the half of the office expenses was or was not rightly charged to capital, no interlocutory injunction could be granted on that ground, inasmuch as the balance carried over to the next half-year on the revenue account was much larger than the sum so charged:

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But that it was doubtful whether interest on debentures issued for lines in construction could be charged to capital:

That it was doubtful whether it was right to pay interest on the *Extension* capital out of the money received from the contractors:

That the questions were not concluded by the certificate of the auditors under 30 & 31 Vict. c. 127, s. 30:

That these were not merely matters of internal management, and that the Court would interfere in such cases if the directors were acting *ultrà vires*:

And that the questions were of such importance and doubt that the injunction must be continued till the hearing.

The Plaintiff had bought his shares a short time before the bill was filed, and to enable him to file the bill:—

Held, that he was not for that reason, or for the reason that these charges had been acquiesced in by the shareholders on former occasions, prevented from obtaining an interlocutory injunction.

BLOXAM *v.* METROPOLITAN RAILWAY COMPANY 337

DIVIDENDS UNDER CREDITORS' DEED—*Jurisdiction—Bankruptcy Act*, 1861, *s.* 197—*Deed under Schedule D.—Order to pay Dividend to a Creditor.*] Where a debtor has executed a deed in the form of Schedule D. to the *Bankruptcy Act*, 1861, the Court of Bankruptcy has jurisdiction, under sect. 197, to order the trustee to pay a dividend to a creditor.

Ex parte DELAUNAY. *In re* PILLING 258

DIVORCE—Wife's chose in action—Decree for dissolution of marriage .. 220
See CHOSE IN ACTION OF WIFE.

DOCUMENTS—Interrogatories by Defendant 809
See INTERROGATORIES BY DEFENDANT.

DOUBLE PROOF—Joint and separate estate 463
See PROOF AGAINST JOINT AND SEPARATE ESTATE.

ENFRANCHISEMENT OF COPYHOLDS to *cestui que trust* 614
See POWER, GENERAL.

EQUITY TO A SETTLEMENT, Wife's—Form of Settlement—Misconduct of husband 215
See FORM OF SETTLEMENT.

ESTATE TAIL—*Cy-près* 93
See CY-PRÈS.

EVIDENCE—Fresh documentary evidence 443
See DISPOSITION BEFORE WINDING-UP ORDER.

——— Production of documents for inspection by witness 818
See PRODUCTION OF DOCUMENTS.

——— Withdrawal of affidavit 220
See AFFIDAVIT, WITHDRAWAL OF.

EXAMINATION OF BANKRUPT after arrangement with creditors—Discharge 610
See DISCHARGE. 1.

EXECUTION OF POWER—Defective, when aided in Equity 47
See DEFECTIVE EXECUTION OF POWER.

EXECUTORS, Liability of—Failure to convert within twelve months .. 605
See EXECUTORS, LIABILITY OF.

EXECUTORS, LIABILITY OF—*Failure to convert within Twelve Months.*] A testator entitled to shares in a company with unlimited liability, directed his executors to convert his estate with all convenient

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speed. *P.* one of the three executors died a year and five weeks after the testator. The shares were not converted, and about fifteen years afterwards the company was wound up, and the surviving executors being placed on the list of contributories paid a large sum out of the estate for calls. A bill was filed against the surviving executors, and the executors of *P.*, to make them liable for the loss. *P.'s* executors did not answer, nor did they in evidence give any reason why conversion had not taken place within twelve months from the testator's death:—

Held (affirming the decree of *Stuart*, V.C.), that *P.'s* estate was liable for all loss occasioned to the testator's estate by the omission to sell the shares within twelve months; and that as *P.'s* executors had not suggested by answer or evidence any reason for the delay, no inquiry could be directed on the subject.

Whether the calls were a loss thus occasioned to the testator's estate, *quære*.

GRAYBURN *v.* CLARKSON 605

FIAT ON PETITION—*Undertaking for Costs—Practice—Appeal from Order at Chambers.*] Where a Petition of rehearing is presented by way of appeal against an order made in Chambers or on motion, the fiat on the Petition will be in the usual form.

BROWN *v.* OAKSHOTT 428

FINAL EXAMINATION—*Adjournment—Imperfect Accounts.*] Where a bankrupt has filed accounts which are clearly imperfect and capable of amendment, the Commissioner has power to adjourn the last examination of the bankrupt *sine die*, although he swears that he can furnish no better accounts. *Secus*, if the accounts, though suspected of falsehood, are complete.

In re HUGHES 147

2. ———— *Adjournment — Imperfect Accounts — False Statements.*] Where a bankrupt refuses to make a full disclosure, an adjournment of the last examination is proper; but it ought not to be made for the purpose of punishing him for a false statement, or to induce him to correct it

Ex parte LEWIS. *In re* LEWIS .. .. 147, n.

3. ———— *Adjourning Examination during Proceedings in another Court.*] It is not the course of the Court of Bankruptcy to suspend proceedings before itself, because a proceeding which may give information as to the bankrupt's estate is pending in another Court.

A bankrupt applied for an order of discharge; but the Commissioner adjourned the meeting for the bankrupt to put in his answer to a bill in Chancery, on the ground that the answer might shew that he had not made a full disclosure of his property. On appeal this order was reversed, and, there being nothing on the bankruptcy proceedings to raise a suspicion that a full disclosure had not been made, the order of discharge was granted.

Ex parte LEE *In re* LEE 150

4. ———— *Bankruptcy—Adjourning Examination—Pendency of Proceedings in another Court.*] The last examination of a bankrupt ought not to be adjourned to await the result of proceedings in another Court; but may properly be adjourned pending any proceedings in bankruptcy which are likely to bring out facts as to which the bankrupt ought to be further examined.

Ex parte RAYNE. *In re* RAYNE 152

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FINES AND RECOVERIES ACT, *s.* 77—Conveyance by married woman —Proceeds of real estate 717
See PROCEEDS OF SALE OF REAL ESTATE.

FIRM OF SOLICITORS—*Liability of Partner for Money received by his Co-partner—Fraud—Jurisdiction.*] The Plaintiff being entitled to a fund in Court, gave the firm of solicitors who had acted for him in the matter a joint and several power of attorney to receive the money from the Accountant-General. The Plaintiff sent the power to *B.*, one of the partners, who received the money, and signed the receipt in his own name. *B.* paid the money into his own private banking account, and shortly afterwards absconded with it. The letters on the subject of the power of attorney, and the cost of stamping it, were charged for in the bill of costs of the firm. Upon a bill seeking to make *S.*, the other partner, liable to repay the money, but not praying for an account:—

Held (affirming the decree of *Malins*, V.C.), that the money must be treated as having come into the hands of the firm in the course of their business as solicitors; and that *S.* was liable for its repayment with interest:

Held, also, that the Court had jurisdiction to give relief, though the bill did not pray for an account, both under its general jurisdiction over solicitors and because *B.* had been guilty of fraud.

ST. AUBYN *v.* SMART 646

——————————— Dissolution—Return of premium 369
See RETURN OF PREMIUM.

FOOT PATH, Diversion of 306
See RAILWAY CLAUSES ACT.

FORECLOSURE obtained by fraud 203
See FRAUD, DECREE OBTAINED BY.

FOREIGN COURT—*Law of Louisiana—Comity of Nations—Duress—Equity.*] A British ship, mortgaged in *England* by a British subject to British subjects, was arrested at *New Orleans* by creditors of the mortgagor, also British subjects resident in *England*, and as the Courts of *New Orleans* do not recognise such mortgages of ships, the mortgagees, in order to protect the ship from sale, gave bonds for the amounts claimed by the creditors. The mortgagees afterwards filed a bill to restrain the creditors from suing on these bonds:—

Held, that though the decisions of the Courts of *New Orleans* might be open to the reproach of injustice, yet as the creditors owed no duty to the mortgagees, and had a right to proceed against the property of their debtor wherever they found it, the bill could not be maintained.

Order of *Wood*, V.C., affirmed.

Talleyrand v. *Boulanger* (3 Ves. 447) observed upon.

LIVERPOOL MARINE CREDIT COMPANY *v.* HUNTER 479

FOREIGN LAW—Plea of penalty under 79
See PENALTY UNDER FOREIGN LAW.

——————————— Ship—Mortgage—Sale—Law of *Louisiana* 479
See FOREIGN COURT.

FORFEITED SHARES, *Past holder of—Company—Unpaid Calls—Interest—Past and present Members*—3 & 4 *Will.* 4, *c.* 42, *s.* 28.] By the articles of association of a company overdue calls were to carry interest at 25 per cent., and, by clause 50, it was provided that the forfeiture of a share should involve the extinction at the time of the forfeiture of all interest in, and all claims and demands against, the company in respect of the share, and all other rights incident to the

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share, but that the shareholder should, notwithstanding, be liable "to pay to the company all calls owing on such share at the time of such forfeiture":—

Held (affirming the decision of the Master of the Rolls), upon the construction of the articles, that a member whose shares had been forfeited for non-payment of a call was liable to pay the call, but not any interest upon it:

Held, also, that interest was not payable under the statute 3 & 4 Will. 4, c. 42, s. 28, no notice having been given after the forfeiture claiming interest on the sum made payable by the 50th clause.

In re BLAKELY ORDNANCE COMPANY. STOCKEN'S CASE .. 412

FORFEITURE by foreign law—Plea of 79
See PENALTY UNDER FOREIGN LAW.

FORM OF SETTLEMENT—*Wife's Equity to a Settlement—Amount to be settled—Misconduct of Husband.*] The Court will not settle the whole of a wife's fund upon her and her children unless the husband is insolvent, or has been guilty of gross misconduct, such as adultery, cruelty, or desertion. In determining the proportion of the fund to be settled, the Court is bound by no fixed rule, but will exercise a judicial discretion according to the circumstances of the case.

The Court will not interfere with the husband's ultimate right to the settled fund in default of children in case of his surviving his wife.

The order of the Master of the Rolls varied.

In re SUGGITT'S TRUSTS 215

FRAUD, Decree obtained by—Foreclosure 203
See FRAUD, DECREE OBTAINED BY.

————, Decree obtained by—Bill to set aside before inrolment—Plea .. 1
See INROLMENT OF DECREE.

———— Money misapplied by solicitor—Jurisdiction 646
See FIRM OF SOLICITORS.

FRAUD, DECREE OBTAINED BY—*Bill to set aside Decree—Assignment pendente lite not disclosed—Foreclosure—Affidavit of non-payment—Costs not following the Event.*] To set aside on the ground of fraud a decree signed and inrolled, actual positive fraud ought to be shewn. Mere constructive fraud is not sufficient, at all events after long delay.

W., as solicitor of *V.*, a second mortgagee, received the rents of the mortgaged property. The first mortgagees obtained a decree for foreclosure, and a first report was made finding what was due to them. *W.* paid them off with his own money, in *V.'s* name, and also paid off *V.* The proceedings went on without *W.'s* interest being disclosed, and shortly afterwards a second report was made finding what was due to *V.* in respect of his own security, and of what he had paid to the first mortgagees, after allowing for the rents received by him. *P.*, the mortgagor, not paying this, an order absolute for foreclosure was made, *V.* making the usual affidavit that he had received nothing towards payment of the sum found due. Between the second report and the making this affidavit *W.* had gone on receiving rents. He was entitled to an undisputed third mortgage, given him by *P.*, on the same property. *P.*, twelve years afterwards, filed a bill to impeach the order for foreclosure absolute as having been obtained by fraud:—

Held, that it was not the duty of *W.*, when he became owner of the mortgages, to disclose his interest, and make himself a party to the proceedings; and that, although the affidavit made by *V.* was in the

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circumstances irregular, the irregularity did not prove any fraudulent design on the part of *W.*, as it was a doubtful question whether he was not entitled to retain the rents towards satisfaction of this third mortgage, which he claimed to do; and if he was so entitled *V.'s* affidavit was substantially correct:

Held, therefore (affirming the decree of *Stuart*, V.C.), that the decree for foreclosure absolute could not be set aside.

Circumstances under which costs should not follow the event considered.

PATCH *v.* WARD 203

FRAUDS, STATUTE OF—Agreement by letters—Uncertainty—Agreement referring to other writings 508

See AGREEMENT BY LETTERS.

FRAUDULENT ASSIGNMENT—*Act of Bankruptcy—Reservation of Furniture and Book Debts—Substituted Security.*] A trader conveyed all his property, except his furniture and book debts, to a creditor for securing a previously existing debt:—

Held, that, notwithstanding the reservation, the deed was fraudulent and void, inasmuch as it placed the bulk of his property out of the reach of his other creditors.

A trader gave a bill of sale of his stock in trade to *A.* in consideration of his indorsing a bill which the trader discounted, but the bill of sale was not registered. Nine months afterwards he executed an assignment of the bulk of his property to *A.* to secure the same debt and further advances:—

Held, that the assignment, being otherwise fraudulent, could not be supported on the ground that it was a substitution for the first bill of sale.

Ex parte FOXLEY. *In re* NURSE 515

FREIGHT, ASSIGNMENT OF—*Mortgagee of Ship—Priority—Completion of Voyage.*] A shipowner mortgaged a ship to *T.*, and by a deed of even date assigned to *T.* all charterparties and freight by way of further security. The mortgage referred to the deed of even date, stating that it contained covenants for payment of the mortgage money, for insuring, and for payment of other moneys, but not alluding to its containing anything more. A charterparty was subsequently effected by the owner, the freight to be paid "on unloading and right delivering of the cargo, as customary," and the owner was to have a lien for the freight on the cargo. During the voyage the owner assigned the freight under this charterparty to *B.*, who knew of the mortgage. The ship arrived in port, and most of the cargo, which was a general one, was delivered to the respective consignees; but before the whole had been delivered, *T.* took possession of the ship:—

Held (reversing the decree of *Stuart*, V.C.), that *T.*, as mortgagee of the ship, having taken possession of her before any freight had become payable from the charterers to the owners, was entitled to the freight in priority to *B.*

Whether *B.* could have been held to have constructive notice of the prior assignment of freight to *T.*, so as to entitle *T.* to priority over him by virtue of that assignment—*quære.*

BROWN *v.* TANNER 597

GARNISHEE, DEBTOR TO COMPANY — *Winding-up — Companies Act*, 1862, *s.* 100—"*Trustee.*"] A creditor of a joint stock company obtained a garnishee order under the 71st section of the *Common Law Procedure Act*, attaching the money of the company in the hands

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of their bankers. Subsequently, a Petition for winding up the company was presented; and after the presentation of the Petition, but before the winding-up order, the creditor obtained an order under the *Common Law Procedure Act* for payment of the money, and received it from the bankers. The official liquidator having taken out a summons under the 100th section of the *Companies Act*, 1862, to cause the creditor to refund the money:—

Held (reversing the decision of *Stuart*, V.C.), that the creditor was not a "trustee" within the meaning of the 100th section; and that the Court had no jurisdiction to make the order.

In re UNITED ENGLISH AND SCOTTISH ASSURANCE COMPANY. *Ex parte* HAWKINS 787

GUARANTEE FOR PAYMENT OF BILL OF EXCHANGE—Equity of holder of bill 753
See SECURITIES FOR BILLS OF EXCHANGE.

HEIR-LOOMS—Limitation by reference 564
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HOLDER OF BILL OF EXCHANGE, Equities of 753
See SECURITIES FOR BILLS OF EXCHANGE.

HUSBAND AND WIFE—Settlement by Court, Form of—Misconduct of husband 215
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———————— Wife's chose in action—Divorce 220
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———————— Wife's real estate—Proceeds of sale—Acknowledgment 717
See PROCEEDS OF SALE OF REAL ESTATE. 1.

ILLEGAL ISSUE OF SHARES—*Confirmation—Subdivision of Shares—Winding-up—Contributory—Ultrà Vires.*] The directors of a company whose capital was £300,000, divided into 3000 shares of £100 each, made an unauthorized issue of 1000 additional shares beyond their capital. They afterwards called general meetings, at which resolutions were passed to increase the capital to £600,000, to be divided into 60,000 shares of £10 each:—

Held (reversing the decision of the Master of the Rolls) that the issue of the 1000 shares, although originally *ultrà vires*, was confirmed by these resolutions; and that the allottees of them were bound by the resolutions, and were rightly placed on the list of contributories in the winding up of the company:

Held, also, that although the subdivision of the original shares was illegal, yet where the original shares could be traced and identified, the shareholders were properly placed on the list of contributories.

In re NEW ZEALAND BANKING CORPORATION. SEWELL'S CASE .. 131

INCORRECT RECITALS—No recitals—Reconveyance of mortgage .. 365
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INDEMNITY—Contributory a trustee for a company 791
See TRUSTEE FOR COMPANY.

INFANT SHAREHOLDER 458
See INFANT TRANSFEREE.

INFANT TRANSFEREE—*Contributory.*] In June, 1865, *S.* having bought in the market shares belonging to *C.*, gave the name of *A.* as the transferee, and *C.* accordingly transferred them to *A.*, who was registered as owner. *A.* was a clerk of *S.*, and was an infant. In

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November, 1865, *C.* received a letter from the solicitors to the company, informing him that *A.* was an infant, and applying to him for payment of a call. *C.* having found upon inquiry that his share certificates had been cancelled and new certificates issued to *A.*, took no further notice of the matter, and no further step was taken on either side till January, 1867, when the application for the call was renewed, after a resolution for winding up the company had been passed:—

Held (affirming the decision of the Master of the Rolls), that *C.* must be on the list of contributories.

In re China Steamship and Labuan Coal Company. Capper's Case 458

2. INFANT TRANSFEREE—*Contributory.*] The holder of shares transferred them to an infant and the transfer was registered. Both the directors and the transferor were ignorant of the infancy of the transferee. Five months afterwards, the transferee being still an infant, the company was wound up:—

Held, that it was the duty of the transferor to see that the transferee was a competent person, and his name was placed on the list of contributories in the place of the infant.

In re Joint Stock Discount Company. Mann's Case .. 459, n.

INFRINGEMENT OF PATENT—*Sufficiency of Prior Specification to be tested by Experiments—Prior Publication—Public Use—Infringement by Transit—Infringement by Workmen—Responsibility of Master—Practice—Decree for Account and Damages.*] The specification of a patent may describe the process to be adopted so insufficiently as to invalidate the patent, and yet disclose enough to shew that what is claimed by a subsequent patent is not new.

Whether a specification contains a sufficient description can only be ascertained by experiment; and in making the experiment knowledge and means may be employed which have been acquired since the date of the patent.

A prior publication will not invalidate a patent, unless it has imparted information so as to enable any one working upon it to reckon with confidence on the result.

In order to establish the prior public use of a patented article so as to invalidate the patent, it is not necessary to shew that the article had been manufactured for sale.

Where the subject of a patent in *England* is made in a foreign country, and applied to the purpose for which it was made, and under these circumstances is sent to this country for transmission to another foreign country:—

Held, that this is a sufficient user of the patent in *England* to constitute an infringement.

It is not an answer to a suit against the directors of a company for the infringement of a patent, to allege that the acts were done by workmen employed by the directors, but contrary to their orders.

The Court, under 21 & 22 Vict. c. 27, can direct an account and award damages in the same suit.

Betts *v.* Neilson. Betts *v.* De Vitre 429

INJUNCTION—Mandatory—Statutory obligation—Public convenience .. 100

See Public Convenience.

———— Suit in Equity restrained—Interpleader 74

See Suit in Equity restrained.

INROLMENT OF DECREE—*Plea of Decree not inrolled—Plea standing for an Answer—Liberty to except.*] Where a bill is filed to impeach a decree for fraud, whether a plea of such decree, with averments

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negativing the fraud, and an answer denying the fraud, is a good plea in bar of the suit, though the decree has not been inrolled, *quære*.

A plea to a bill impeaching a decree for fraud, and asking accounts, being ordered to stand for an answer, with liberty to except, the right of excepting was limited so as to preclude the Plaintiff from calling on the Defendants to set out accounts which could not be evidence in support of the charge of fraud.

Order of *Kindersley*, V.C., affirmed.

PEARSE *v.* DOBINSON 1

INSOLVENCY—Effect of discharge in bankruptcy on claim of assignee in insolvency 639

See DISCHARGE. 2.

———— Notice of, casually acquired 488

See NOTICE OF ASSIGNMENT.

INSURANCE COMPANY—Marshalling—Policy holders and creditors 167

See MARSHALLING. 3.

INSURANCE OF SHIP—Money paid under—Ship chartered by purchaser of cargo—Stoppage *in transitu* 588

See STOPPAGE IN TRANSITU.

INTEREST ON BOND DEBT payable in excess of penalty 691

See ACCUMULATIONS.

INTEREST ON CALLS—*Winding-up—Contributory.*] In the winding up of a company a call was made, and the notice of call required payment of the call by a given day, and stated that if it was not paid by that day interest at £5 per cent. per annum would be charged:—

Held, that the statute 3 & 4 Will. 4, c. 42, was applicable, and that interest at £5 per cent. from the day named in the notice of call up to the time of payment must be paid.

In re OVEREND, GURNEY, & Co. BARROW'S CASE 784

———— Forfeited shares 412

See FORFEITED SHARES.

INTERIM ORDER, Breach of—Payment of rents of estate of deceased lunatic 719

See DECEASED LUNATIC. 2.

INTERPLEADER—Injunction—Suit in equity restrained 74

See SUIT IN EQUITY RESTRAINED.

INTERROGATORIES BY DEFENDANT—*Affidavit of Documents—Further Affidavit—"Reasonable Suspicion."*] A Plaintiff, being ordered to make an affidavit as to documents in his possession, filed an affidavit with a schedule of documents not including any title deeds of the property to which the suit related, and of which he was the owner in possession. There was nothing in the proceedings to shew whether any title deeds existed. The Defendants moved that he might be ordered to file a further affidavit as to title deeds:—

Held, that the probability of the Plaintiff having title deeds did not raise such a "reasonable suspicion" of the insufficiency of the affidavit as to entitle the Defendants to call upon him for a further one, as in *Noel* v. *Noel* (1 D. J. & S. 468).

Per Wood, L.J.:—The rule in *Noel* v. *Noel* can only be applied where the party making the affidavit has made some admission which discredits it.

Per Selwyn, L.J.:—If "reasonable suspicion" be sufficient ground to call for a further affidavit, it must be suspicion founded on the pleadings and affidavits, and not on mere surmise.

WRIGHT *v.* PITT 809

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See STAY OF PROCEEDINGS. 2.

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JOINT OR IN COMMON—Annuity whether 183
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——— Bankruptcy—Appeal from order refusing or suspending discharge 142
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——— Creditors' deed—Power to order dividend 258
See DIVIDENDS UNDER CREDITORS' DEED.

——— Creditors' deed—Receiver 820
See RECEIVER.

——— Fraud committed by solicitor 646
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——— Lord Mayor's Court—*Certiorari* 200
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——— Lunacy and Chancery—Estate of deceased lunatic—Adverse claimants—Receiver 175, 719
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LACHES in allotting shares—and in rectification of register 592
See ACCEPTANCE OF SHARES. 5.

——— Continual claim without enforcing it 496
See COVENANT NOT TO ASSIGN.

LANDS CLAUSES ACT—*s.* 128—*Surplus Lands—Right of Pre-emption—"Land in a Town"—Fraud on Parliamentary Powers.*] A railway company gave to landowners notice to treat in respect of a close of land containing 1A. 27P., part of the *C.* estate. The price was settled between the parties, and the land conveyed to the company by a deed not in the statutory form, including the mines and all the estate of the vendors. The company used about three perches of the land for their railway; and about two years after their purchase they, in pursuance of a contract which, before the notice to treat, they had made with *T.*, to convey to him all such part of the *C.* estate as lay between his land and the railway, conveyed the remaining 1A. 24P. to him by a deed which recited that it was superfluous land. The land was situate within the limits of a borough, but was at some distance from the mass of houses forming the town. There were two cottages upon it:—

Held (affirming the decree of *Stuart*, V.C.), that the land was not "land in a town," nor "land built upon or used for building purposes," within the meaning of the *Lands Clauses Act*, sect. 128, so as to take away the vendors' right of pre-emption; that this right was not extinguished by the mode of conveyance; and that, although the ten years mentioned in the 127th clause of the Act had not expired, the

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vendors, inasmuch as the company had parted with the land as superfluous, could at once exercise the right of pre-emption:

Held, also, that the vendors would have been entitled to relief on the ground that the company had taken the land, not for the purposes of their Act, but in order to enable them to fulfil their contract with *T.*

LORD CARINGTON *v.* WYCOMBE RAILWAY COMPANY 377

2. LANDS CLAUSES ACT—*s.* 128—*Surplus Lands*—*Pre-emption*—"*Purposes of the Acts*"—*Accommodation Works.*] A railway company bought from the Plaintiff a small piece of land, the whole of which, according to their original plan, would have been covered by the embankment of the railway. Being obliged to provide a communication between severed lands of another landowner, the company altered their levels so as to narrow the embankment and leave unoccupied a strip of the land purchased from the Plaintiff. This strip they turned into a road for the use of the other landowner. The Plaintiff thereupon, before the period named for the sale of superfluous lands had arrived, filed his bill to enforce a right of pre-emption as to the strip:—

Held (reversing the decision of *Stuart*, V.C.), that the land was not superfluous land, for that the making accommodation works which the company were compellable to make was one of the purposes of their Acts, and that the Plaintiff, therefore, had no title to relief.

But *held*, agreeing with the Court below, that the suit was not premature, for that if the making the road had not been one of the purposes of the Acts, the permanent dedication of the land to that purpose would have established the land to be superfluous land, so as to entitle the Plaintiff at once to enforce his right of pre-emption.

LORD BEAUCHAMP *v.* GREAT WESTERN RAILWAY COMPANY .. 745

———— Sale of railway 740
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LEGAL PERSONAL REPRESENTATIVE—Retainer 195
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LEGAL RIGHT—Right to trial by jury 417
See TRIAL BY JURY.

LEGATEES, PECUNIARY AND RESIDUARY—Abatement for loss of assets 537
See LOSS OF ASSETS.

LIABILITY—Committee of Lunatic—Liability to account 317
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———— Executors—Failure to convert within twelve months .. 605
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See MINING LICENSE.

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LIEN OF SOLICITORS 125, 797
See SOLICITOR'S LIEN. 1, 2.

LIQUIDATORS, *Appointment of—Voluntary Winding-up under Supervision—Discretion of the primary Judge—Restrictions imposed on the Liquidator—Companies Act*, 1862, *s.* 151.] A company passed a resolution for a voluntary winding-up. Before the meeting to confirm it a Petition was presented by contributories praying for a compulsory winding-up, or, in the alternative, that if the resolution should be confirmed, the winding-up might be made subject to the supervision of the Court. This Petition was ordered by the Master of the Rolls to stand over till after the confirmation meeting should have been held, and his Lordship expressed an opinion that the company ought not to appoint any liquidator, and required an undertaking accordingly. At the meeting the previous resolution was confirmed, but no liquidator was appointed. The Petition came on again, and a supervision order was made, and the Master of the Rolls subsequently selected, out of several persons nominated for the office of liquidator, the one who was supported by the smallest number of contributories. A motion was afterwards made by some contributories, and supported by a large majority of the contributories, that the liquidator be removed, or additional liquidators appointed to act with him, but it was not alleged that the person appointed was in any respect an improper person. This motion having been refused by the Master of the Rolls:—

Held, upon appeal, that as the contributories did not at the proper time exercise their right of appointing a liquidator, it became the duty of the Court to appoint one, and, an appointment having been made, the Court of Appeal ought not to interfere with the discretion of the primary Judge.

The Court refused to appoint any additional liquidator, upon the ground that, there being a very hostile feeling between the parties, such an appointment, if one were appointed, would lead to litigation and expense, and if more than one were appointed, would lead to the person originally appointed being outvoted.

An order was made that the liquidator should conduct the winding-up subject to such restrictions as an official liquidator would in a compulsory winding-up be subject to, except so far as the Court might, on application for that purpose, modify or dispense with such restrictions in any case or class of cases.

In re LONDON QUAYS AND WAREHOUSES COMPANY 394

2. ————, *Authority of — Signature — Companies Act*, 1862, *s.* 133—*Claim.*] The four liquidators of a company resolved that one of them should have power to accept bills:—

Held, that this, as a general authority, would not be sufficient under the *Companies Act*, 1862, which requires the signature of two liquidators, but that the four liquidators might authorize any one to sign any particular bill.

Bills accepted by one liquidator, in pursuance of this resolution, were held to be invalid against the company, but the holders of the bills were allowed to claim as creditors for money advanced.

Order of *Stuart*, V.C., reversed.

In re LONDON AND MEDITERRANEAN BANK. *Ex parte* BIRMINGHAM BANKING COMPANY 651

LIQUIDATOR, PROVISIONAL—Appointment of 462
See PROVISIONAL LIQUIDATOR.

LORD JUSTICE SITTING ALONE—*Jurisdiction—Statutes* 17 & 18 *Vict. c.* 82; 30 & 31 *Vict. c.* 64—*Appeal from Court of Chancery of*

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County Palatine of Lancaster.] The statute 30 & 31 Vict. c. 64, for the dispatch of business in the Court of Appeal in Chancery, does not enable one of the Lords Justices sitting alone to act as a Court of Appeal from the Court of Chancery of the County Palatine of *Lancaster*.

KERSHAW *v.* VICKERS 513

LORD MAYOR'S COURT—*Certiorari—Practice.*] A writ of *certiorari* will be issued to remove a suit out of the Equity side of the Lord Mayor's Court into the Court of Chancery on a bill being filed for the purpose, and evidence being given that neither the Plaintiff nor the Defendant, nor the subject-matter of the suit, were within the jurisdiction of the Lord Mayor's Court, and that the cause of action did not arise there.

Proceedings on the return to the writ.

DAVIES *v.* MAC-HENRY 200

LOSS OF ASSETS—*Legatees, Pecuniary and Residuary—Appropriation—Abatement.*] A testator, by his will, gave £2300 Bank Annuities to trustees upon trust to pay so much of his debts as his ready money should be insufficient to satisfy, and to hold the residue upon trust to pay the dividends to his wife during her life, and after her death to sell the fund, and also his household furniture, and out of the proceeds, and all other his personal estate, to pay seven legacies amounting to £1075, and to pay the residue to *W. B.* absolutely. The testator died in 1832, and his estate was administered, and the whole of the sum of £2300 Bank Annuities, no part being required for payment of debts, was transferred into the names of the trustees. Both trustees died, and the administrators of the survivor got possession of the fund and misappropriated the greater part of it, so that only £716 was forthcoming. The widow died in 1862:—

Held (reversing the decision of *Malins*, V.C.), that there having been no consent of the legatees to the special appropriation of the fund, the ordinary rule, that the residuary legatee could take nothing till all the pecuniary legatees had been paid, must prevail.

BAKER *v.* FARMER 537

LOUISIANA, Laws of—Sale of ship—Creditors' suit 479
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LUNATIC—Estate of deceased lunatic—Adverse claimants—Receiver 175, 719
See DECEASED LUNATIC. 1, 2.

———— Liability of committee to account 317
See COMMITTEE OF LUNATIC.

———— Settled Estates Act—Permission of Court of Lunacy to consent by committee 229
See SETTLED ESTATES ACT.

MANDATORY INJUNCTION—Difference between nuisance and breach of contract—Suit by individual and by Attorney-General 100
See PUBLIC CONVENIENCE.

MARRIED DAUGHTER, Advancement of—Setting up in business 622
See ADVANCEMENT.

MARRIED WOMAN'S REAL ESTATE, Proceeds of sale of—Fines and Recoveries Act 717
See PROCEEDS OF SALE OF REAL ESTATE. 1.

MARSHALLING — *Administration — Will — Pecuniary and Specific Legatee—Residuary Legatee, whether Specific — Wills Act*, s. 24.] *Held*, upon the construction of a will, that a legacy was not charged on the residuary real estate.

Where the meaning of a will is doubtful, the Court may resort to

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evidence of the state of the testator's property, but where the words are plain no such extrinsic aid can be resorted to.

Decree of *Kindersley*, V.C., affirmed.

A residuary devise of real estate remains specific notwithstanding the 24th section of the *Wills Act* which makes the will speak as if it had been executed immediately before the death of the testator.

Where the personal estate is insufficient for the payment of debts and legacies, pecuniary legatees and the residuary devisee contribute rateably to the payment of the debts which the general personal estate is insufficient to satisfy.

Order of *Kindersley*, V.C., reversed.

HENSMAN *v.* FRYER 420

2. MARSHALLING—*Winding-up—Past and Present Members—Contributories—Companies Act*, 1862, *s.* 38.] Where it appeared that the persons who were members of a limited company at the time when the order was made for winding it up would not be able to pay enough to satisfy the debts of the company if the whole amount of the shares were called up:—

Held, that past members of the company, who had not ceased to be members for one year prior to the winding-up, must be placed on the list of contributories.

Relative liabilities of past and present members considered.

Order of the Master of the Rolls affirmed.

In re BARNED'S BANKING COMPANY. ANDREW'S CASE 161

3. ———————— *Winding-up—Unlimited Company—Creditors of Company formed under 7 & 8 Vict. c.* 110—*Insurance Company—Costs of realizing Assets.*] The deed of settlement of a company formed under 7 & 8 Vict. c. 110, contained a provision that each shareholder, as between him and the other shareholders, should be liable to the debts of the company in proportion to his interest in the property of the company, but not further or otherwise, and a covenant that if any shareholder should pay a debt due from the company, the debt should be divided into as many parts as there were shares, and each shareholder should pay one or more such parts in proportion to his interest in the capital of the company, such interest to be determined by the number of his shares. It was also provided that if the company was indebted to a shareholder, the directors should pay him as if he was not a shareholder:—

Held (affirming the decision of the Master of the Rolls), that on the winding up of the company, the shareholders, who were creditors of the company, were entitled to be paid in full like other creditors, by means of a call on the shareholders, they being debited with the call in respect of their own shares, and that if any of the shareholders could not pay the call, the deficiency must be made up by the others.

The company granted policies of assurance, by the terms of which the assured had no claim against the shareholders beyond the amount unpaid on their shares. Under the winding-up, the assets of the company, including the full amount payable on the shares, were applied in paying the policy-holders and the general creditors *pro rata*. It was decided by the Master of the Rolls that the balance remaining due to the general creditors, and the costs of the winding-up, must be raised by a call on the shareholders. On appeal motion to vary this decision by making the costs of realizing the assets a deduction from the assets, so as to throw a share of such costs on the policy-holders:—

Held, that the costs of realizing the assets, in the course of a winding up by the Court, ought to be treated as part of the costs of the winding-up, and to be borne wholly by the shareholders.

In re PROFESSIONAL LIFE ASSURANCE COMPANY 167

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MINING LICENSE—*Extent of Right thereby conferred—Subsequent Lease by the Licensor to another Person—Priority of Possession—"Workable Coal Seam."*] By a deed dated the 29th of September, 1854, *R.* demised to *C.* a certain fire-brick manufactory, and by the same deed he granted to *C.* power to dig fire-clay from under certain lands therein described, the term of the demise and license being twenty-one years from the 6th of April, 1854. By a deed dated the 31st of August, 1862, *R.* demised to *B.* all the coal mines and seams of coal, "and also all the mines, seams, veins, or beds of ironstone and fire-clay found in connexion with such coal seams as are workable as coal seams," under the same lands as those to which *C.'s* license applied, for the term of forty-two years from the 22nd of November, 1858. In August, 1866, *C.* commenced opening an old pit, called the *Montague Pit*, with the intention of reaching a seam known as the *Stone Coal Seam*, in order to work the fire-clay in connexion with that seam. Previously to this, in the year 1864, *B.* had sunk a pit through the *Stone Coal Seam*, to get at a lower coal seam, and he had taken samples of the fire-clay in the *Stone Coal Seam*, some of which samples he had sent to *C.* to be tested, and he had afterwards sold some of the fire-clay to *C.* for the purpose of being manufactured. After *C.* had expended a considerable amount of money on his works at the *Montague Pit*, but before he had reached the *Stone Coal Seam*, *B.* gave notice to him that he (*B.*) had already proved the *Stone Coal Seam*, and was about to work it, and that it would be an invasion of his rights if *C.* were to work that seam. Ultimately *C.* filed his bill to restrain *B.* from working the fire-clay or the coal in the *Stone Coal Seam* under any part of the lands to which *C.'s* license applied during the continuance of *C.'s* term. Vice-Chancellor *Stuart* made a decree for an injunction:—

Held, upon appeal, that the words "coal seams workable as coal seams," must be construed regard being had to all and every the powers conferred by the lease in which those words were found, and that, looking at these powers and at the evidence, which, in the opinion of the Court, shewed that the *Stone Coal Seam* was workable at a profit when both the coal and the fire-clay were taken into account, that seam must be considered to be comprised in *B.'s* lease:

Held, also, that as *C.'s* license was not an exclusive license, the licensor had still a right to deal with the property comprised in that license in any manner not inconsistent therewith:

Held, also, that *B.* had first taken possession of the *Stone Coal Seam*, and that *C.* had no right to an injunction to restrain *B.* from working that seam:

Held, also, that no knowledge could be imputed to the licensor of the extent of *C.'s* business, or of the probability that he would require for the purposes of that business during his term of twenty-one years the whole of the fire-clay lying under the lands comprised in his license.

Bill dismissed with costs.

CARR *v.* BENSON 524

MISCONDUCT OF HUSBAND—Wife's equity to a settlement .. 215

See FORM OF SETTLEMENT.

MISJOINDER OF PLAINTIFFS—Amendment at the hearing by adding co-Plaintiffs 32

See AMENDMENT BY ADDING PARTIES. 1.

MISREPRESENTATION—Prospectus—Company .. 467, 493, 682

See MISREPRESENTATION IN PROSPECTUS. 1, 2, 3.

MISREPRESENTATION IN PROSPECTUS—*Bill filed after Winding-up Petition—Practice—Re-hearing—Dismissal.*] A Plaintiff cannot

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be relieved from shares in a company upon the ground of misrepresentation in the prospectus, on a bill filed after the presentation of a Petition for winding up the company, on which an order was subsequently made.

Decree of *Wood*, V.C., reversed.

Where a decree has been made against several Defendants, the bill may be dismissed against all the Defendants on a Petition of re-hearing presented by one Defendant only.

KENT *v.* FREEHOLD LAND AND BRICK-MAKING COMPANY .. 493

2. MISREPRESENTATION IN PROSPECTUS—*Rectification of Register —Relief from Shares.*] The directors of a company published a prospectus stating, amongst other things:—1. That more than half the shares had been subscribed for. 2. That the company had contracted to purchase estate *A.*, on which the vendors had expended £70,000. 3. That the company had contracted to buy estate *B.* The facts were:—1. That *S.*, the promoter of the company, had signed a document applying for more than half the shares for himself or his nominees, but he had paid no deposit on the shares, and he ultimately took only 200 shares, the rest having been allotted to general applicants. 2. That *S.* had not spent anything on estate *A.*, but had agreed to buy it from vendors who were alleged, but not proved, to have spent £70,000 upon it. 3. That there was no binding contract as to estate *B.*, but that *S.* had arranged terms with the owners on which they would be willing to sell to him, and had also arranged terms on which he would sell to the company if the allotment of shares took place:—

Held, that, under the circumstances, the Plaintiff, who had taken shares on the faith of the prospectus, and had filed his bill before any proceedings for winding up the company, was entitled to be relieved from his shares on the ground of misrepresentations in the prospectus.

Decree of *Wood*, V.C., affirmed.

ROSS *v.* ESTATES INVESTMENT COMPANY 682

3. ———— *Relief from Shares — Change of Directors—Misjoinder.*] The directors of a company, which was intended to own and trade with steamships, issued a prospectus stating, amongst other things, that the company would commence operations with six screw steamships of a certain description, and referring to the articles of association. The Plaintiff signed and addressed to the directors the printed form of application annexed to the prospectus, asking for fifty shares, which were allotted to him. The company had no steamships at the time when the prospectus was issued, but afterwards obtained some, not of the description mentioned in the prospectus; and before the shares were allotted to the Plaintiff, one of the directors named in the prospectus had retired, and another was appointed in his place.

The Plaintiff filed a bill on behalf of himself and all the other shareholders except the directors who were made Defendants, seeking to be relieved from his shares on the ground of misrepresentation in the prospectus:—

Held, that such a suit could not be maintained by the Plaintiff on behalf of the other shareholders, but that his suit was not, therefore, to be dismissed, as he had merely made a misjoinder of Plaintiffs:

Held, that the change of directors before the allotment did not render the allotment invalid:

Held, that the statement as to the six ships was merely ambiguous, and that the Plaintiff might have ascertained that it was not literally true by reference to the articles of association:

The prospectus named three persons as directors who had consented to act, but never took any shares:—

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Held, that this was not a misrepresentation:
Held, that, under the circumstances, the Plaintiff could not be relieved from his shares.
Decree of *Wood*, V.C., affirmed.
HALLOWS *v.* FERNIE 467

MISTAKE in recitals—Reconveyance of mortgage 365
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MORTGAGE—Building society—Satisfaction of mortgage—Priority—Tacking 576
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——— Reconveyance—Incorrect recitals—No recitals 365
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——— Share in a newspaper—Copyright 703
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——— Shares—Complete assignment—Order and disposition .. 555
See ORDER AND DISPOSITION.

——— Ship—Creditors' suit in *Louisiana* 479
See FOREIGN COURT.

——— Ship and freight 597
See FREIGHT, ASSIGNMENT OF.

MORTMAIN—Legacy out of personalty and proceeds of sale of real estate 672
See PROCEEDS OF SALE OF REAL ESTATE. 2.

——— Secret trust for charity 362
See SECRET TRUST.

NEGOTIABLE SECURITIES—Holders of—Creditors' deed—Assent of creditors. 232
See ASSENT OF CREDITORS.

NEWSPAPER, *Mortgage of Share in—Copyright—Priority—Equities between Partners.*] A suit was instituted between *B.* and *H.* as to the proprietorship of a newspaper, in which it was ultimately decided that they were entitled in equal moieties. During the progress of the suit *B.* assigned his share in the newspaper, and the right of publication, and in the profits thereof, to *W.* The assignment contained a recital of the proceedings in the suit, and a power of sale. Afterwards *B.* mortgaged the same share to his partner *H.* to secure sums due to *H.* in respect of that share. *W.* registered his assignment at *Stationers' Hall* under the provisions of the *Copyright Act*, and subsequently sold the mortgaged share to the Plaintiff under his power of sale. Both *W.* and the Plaintiff permitted the newspaper to be carried on by *B.* and *H.* jointly. On a bill filed by the Plaintiff for a declaration that he was entitled to a moiety of the newspaper:—
Held, first, that there is nothing analogous to copyright in the name of a newspaper, and therefore the registration of the assignment at *Stationers' Hall* was futile; but that the proprietor has a right to prevent any other person from adopting the name, and that this right is a chattel capable of assignment.
Secondly: that as *W.* and the Plaintiff knew of the suit between *B.* and *H.*, and also permitted them to carry on the newspaper as partners, the Plaintiff could only take *B.'s* share subject to the equities subsisting between the partners.
The decree of *Stuart*, V.C., varied.
KELLY *v.* HUTTON 703

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NEXT FRIEND—*Person of Unsound Mind—Taking Bill off the File—Costs.*] *M.* filed a bill as next friend of *P.*, whom he alleged to be of unsound mind. An application in Lunacy was directed, and *P.'s* sanity was established. *P.* thereupon applied to have the bill taken off the file, which was ordered, but without any directions as to costs. *P.* moved the Court of Appeal to vary this order by directing the next friend to pay his costs as between solicitor and client, and the Defendant moved to vary it by inserting a direction for the next friend to pay her costs :—

Held, that *P.* was entitled to indemnity against all consequences of the suit having been instituted in his name, and that *M.* must pay *P.'s* costs as between solicitor and client of the application to the Court below, and of *P.'s* appeal motion, and must pay the Defendant's costs of the suit as between party and party, including the costs of motions in the Court below and on appeal.

PALMER *v.* WALESBY 732

"NEXT OF KIN OF A. B. IN BLOOD *as if she had died unmarried*," *read* "*Nearest Relations*," *not Statutory Next of Kin.*] A testator gave a legacy to his daughter for life, and in default of issue, in trust "for her next of kin in blood as if she had died unmarried." The daughter died without issue :—

Held (reversing the order appealed from), that the only surviving sister of the daughter was entitled to the legacy in exclusion of children of deceased brothers and sisters, for that the words "as if she had died unmarried" did not point to the mode of distribution in cases of intestacy, and that "next of kin," therefore, must be taken as meaning nearest relations, and not persons entitled as next of kin according to the statute.

HALTON *v.* FOSTER 505

NON-TRADER—Change of petitioning creditor 247

See PETITIONING CREDITOR. 1.

———— Substituted service on—Absconding debtor 252

See PETITIONING CREDITOR. 2.

NOTICE—Mortgage of shares—Notice to directors 555

See ORDER AND DISPOSITION.

NOTICE OF ASSIGNMENT—*Notice of Insolvency—Casual Knowledge—Priority.*] The trustee of a fund saw in a newspaper the notice of a Petition to the Insolvent Debtors' Court, presented by his *cestui que trust*, and acted on the information so acquired :—

Held, under the circumstances, that a subsequent assignee of the *cestui que trust* who had given to the trustee formal notice of the assignment did not thereby acquire priority over the assignee in insolvency.

Order of the Master of the Rolls reversed.

LLOYD *v.* BANKS 488

NOTICE TO TREAT—*Time within which Powers may be exercised.*] A railway company, after the compulsory powers of their original Act had expired, and the railway was opened for traffic, obtained another Act enabling them to widen their line and enlarge their stations, and to take additional pieces of land :—

Held, that, under the circumstances, the company could not proceed to take a piece of land subject to the compulsory powers of both Acts under a notice to treat given under their original Act.

Quære, whether the compulsory powers of taking land, if not acted upon, ought not to expire when the time limited for the completion of the railway has expired.

Decree of the Master of the Rolls affirmed.

RICHMOND *v.* NORTH LONDON RAILWAY COMPANY 679

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OFFICIAL LIQUIDATOR—*Companies Act*, 1862, ss. 35, 98—*Rectification of Register on Application of Official Liquidator.*] On an application, under the *Companies Act*, 1862, ss. 35, 98, to rectify the register of shareholders, the Court will have regard to who is the applicant; and where, owing to the default of the company, a transfer has not been registered before the winding-up, the Court will not rectify the register on the application of the official liquidator, whatever may be the right of the transferor to have it rectified, for the official liquidator in such a case represents only the company, to whose default the error is owing, the body of contributories having no interest in the question except through the company, and the creditors having no direct equity against a person whose name has never been held out to them.

In re JOINT STOCK DISCOUNT COMPANY. SICHELL'S CASE .. 119

OMISSION OF DEBT *from Schedule—Bankruptcy Act*, 1861, s. 192—*Companies Act*, 1862, s. 75—*Reasonable Provisions.*] Shortly before a company was wound up a shareholder executed a deed of arrangement with his creditors, which contained no *cessio bonorum*, but only covenants by the creditors that they would not enforce payment within two years, and by the debtor that he would pay in full at the expiration of that period. The debtor was at that time liable for two calls made by the company, but he did not include them in the schedule sent in to the Registrar, and another call was subsequently made by the official liquidator:—

Held (affirming the decision of *Wood*, V.C.), that the omission of the debts from the schedule was not a ground on which the Court of Chancery could hold the deed to be invalid; that there being no inequality as between creditors, and no fraud, the Court would not judge of the reasonableness of the arrangement as between the debtor and his creditors; and that, so far as related to the calls that were due at the date of the deed, the official liquidator was bound by the deed:

But *held* (reversing the decision of *Wood*, V.C.), that, having regard to the frame and provisions of the deed, which only applied to debts actually due, the official liquidator might proceed against the shareholder for the subsequent calls.

In re RICHMOND HILL HOTEL COMPANY. *Ex parte* KING .. 10

ORDER AND DISPOSITION—*Bankruptcy—Assignment of Shares in Joint Stock Company—Notice to Company by Assignor—Casual Knowledge.*] A shareholder in a joint stock company made an assignment of certain paid-up shares by way of mortgage. The assignee gave no notice to the company. The assignor had also unpaid shares in the same company, and in the course of discussions at the board of directors respecting the unpaid shares the assignor verbally informed the directors of the assignment of his paid-up shares; but no entry was made on the minutes of this notice. The assignor afterwards became bankrupt:—

Held, that inasmuch as the directors received the information in the course of the transaction of the business of the company, the notice was sufficient to make the assignment complete in equity; and that the shares did not remain in the order and disposition of the bankrupt.

Ex parte AGRA BANK. *In re* WORCESTER 555

ORDER EX PARTE WITHOUT EVIDENCE — Amendment by adding parties 815

See AMENDMENT BY ADDING PARTIES. 2.

ORDER NISI—Charging order 452

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ORDER NISI—Dissolution of marriage 220
See CHOSE IN ACTION OF WIFE.

OUTLAWRY—Bankruptcy Act, 1849, s. 112—"In prison for debt" .. 240
See DISCHARGE FROM PRISON. 1.

PARTIES—Amendment by adding 32, 815
See AMENDMENT BY ADDING PARTIES. 1, 2.

PARTNERS—Equities between mortgagees of share in newspaper .. 703
See NEWSPAPER.

———— Liability of one partner for money received by his co-partner 646
See FIRM OF SOLICITORS.

PARTNERSHIP—Dissolution—Return of premium 369
See RETURN OF PREMIUM.

PAST MEMBER—Forfeited shares, past holder of 412
See FORFEITED SHARES.

————————, Liability of, in winding-up 161
See MARSHALLING. 2.

PATENT, Infringement of—Infringement by workmen—Sufficiency of Specification—Prior publication—User in *England* 429
See INFRINGEMENT OF PATENT.

PATENT SUIT—Decree for amount of damages 429
See INFRINGEMENT OF PATENT.

———————— Legal right 417
See TRIAL BY JURY.

PENALTY UNDER FOREIGN LAW—*Pleading—Discovery—Relief—Forfeiture.*] To a bill filed by the *United States of America*, alleging that they had succeeded to the rights of the late *Confederate States of America*, and praying an account and relief in respect of money received by the Defendant, as agent for the *Confederate States*, the Defendant pleaded that by a law of the *United States* the property of all persons who had acted as agents for the *Confederate States* was liable to confiscation, and that proceedings were actually pending in *America* for confiscation of his property there on the ground of his having so acted as agent, and that he could not answer without exposing himself to such confiscation, and that the Plaintiffs could not have relief without waiving the right to confiscate:—

Held, that the plea was bad so far as related to the relief, but good as to the discovery, and that the Plaintiffs must be allowed to proceed and prove their case if they were able to do so without the answer of the Defendant.

King of the Two Sicilies v. *Willcox* (1 Sim. (N.S.) 301) distinguished.

Order of *Wood*, V.C., affirmed in part and reversed in part.
UNITED STATES OF AMERICA *v.* MCRAE 79

PERSONAL ESTATE limited like real estate 564
See REFERENTIAL BEQUEST.

PETITIONING CREDITOR—*Bankruptcy—Failure to obtain Adjudication—Non-Trader—Change of Creditor—Bankruptcy Act*, 1861, *ss.* 69, 70, 232—*Bankruptcy Act*, 1849, *s.* 101.] When the petitioning creditor fails to proceed and obtain adjudication on a petition against a non-trader, it is not competent to another creditor to apply for adjudication upon that petition. The 101st section of the Bankruptcy Act,

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1849, does not apply to proceedings against non-traders under the Act of 1861.

In re BRISTOW 247

2. PETITIONING CREDITOR — *Limited Company — Non-Trader— Bankruptcy Act*, 1861, *ss.* 70, 87—*Adjudication—Limited Company— Petitioner—Service on Debtor—Appeal to House of Lords.*] A limited company can maintain a petition for adjudication under sect. 87 of the *Bankruptcy Act*, 1861, and the secretary can make the necessary oath; in such cases the practice is for the petition to be sealed with the corporate seal, and signed by two directors and the secretary.

A non-trader, much indebted, had left the realm, and an order had been made, under sect. 70 of the Act of 1861, for service of a petition for adjudication on him abroad. His solicitor, with whom he was in communication, was present when this order was made; but gave no information, and declined to accept service. The Petitioners sent a clerk abroad, who was unable to find and serve the debtor. Service of the petition was then ordered to be made on the solicitor, and the debtor was thereupon adjudged bankrupt:—

Held, on appeal from the Commissioner, that under the circumstances the adjudication was good.

Conditions discussed under which leave would be given to appeal to the House of Lords under 12 & 13 Vict. c. 106, s. 18.

In re CALTHROP 252

PLEA—Penalty under foreign law 79
See PENALTY UNDER FOREIGN LAW.

——— *Res judicata*—Decree before inrolment—Plea standing for an answer 1
See INROLMENT OF DECREE.

POLICY HOLDERS, Claim of—Winding up of insurance company .. 167
See MARSHALLING. 3.

PORTIONS, Accumulations for—Thellusson Act 691
See ACCUMULATIONS.

"POSSESSION," *Meaning of Word—Specific Performance—Vendor and Purchaser—Time of the Essence of the Contract.*] Where a contract for purchase provides that possession shall be given by a certain day, the word "possession" must be understood to mean possession with a good title shewn. This construction is the same in equity as at law, although a Court of Equity will consider time not to be of the essence of the contract, and will relieve against a breach of performance at the date assigned, unless there is something in the contract, the nature of the property, or the circumstances, which renders it inequitable for the Court to interfere.

A person agreed to purchase a leasehold house for his own residence, and contracted that he should have possession by a certain day; but the vendor, although he tendered possession, failed to shew a good title by the day named:—

Held (reversing the decision of *Stuart*, V.C.), that the stipulation as to time was of the essence of the contract, and bill for specific performance of the agreement dismissed.

TILLEY *v.* THOMAS 61

POWER, General, or confined to issue 614
See POWER, GENERAL.

——— Limited to a prescribed period—Will speaking from death .. 47
See DEFECTIVE EXECUTION OF POWER.

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POWER, GENERAL, *or confined to Issue—Covenant to settle—Reference to Uses, whether it includes a Power—Enfranchisement to Cestui que Trust—Direction that Vendor shall convey.*] By a marriage settlement, reciting only the intended marriage, and that it had been agreed that the lady's property should be settled and assured to the uses after mentioned, freeholds were conveyed to the use of the wife for life, remainder to the husband for life, remainder to such uses and upon such trusts as the wife should appoint, and in default of appointment to uses in favour of the issue of the marriage. The wife covenanted to surrender her copyholds "to the uses hereinbefore expressed" concerning the freeholds:—

Held, that the power of appointment was general, and could not be restricted to a power to appoint to issue. *Bristow* v. *Warde* (2 Ves. 336) explained:

Held, also, that the covenant to surrender the copyholds to the same uses as the freeholds made the copyholds subject in equity to the same power of appointment as the freeholds, though powers were not expressly referred to in the covenant.

An appointee under the power was admitted to the copyholds, and obtained an enfranchisement to himself:—

Held, that the concurrence of the customary heir of the settlor was a question of conveyance, and not of title, for that the heir clearly had no beneficial interest.

In a decree for specific performance, a direction that the vendor shall convey has the same effect as a direction that the vendor and all other necessary parties shall convey.

Order of *Stuart*, V.C., affirmed.

MINTON *v.* KIRWOOD 614

PRACTICE—Adding to decree—Appeal 330
See ADDING TO DECREE.

———— Advancing appeal from order on demurrer 231
See ADVANCING APPEAL.

———— Amendment by adding parties 32, 815
See AMENDMENT BY ADDING PARTIES. 1, 2.

———— Appeal by one Defendant—Dismissal as to all 493
See MISREPRESENTATION IN PROSPECTUS. 1.

———— Appeal—Order adding to decree 330
See ADDING TO DECREE.

———— Appeal—Order in Chambers or on motion—Undertaking as to costs 428
See FIAT ON PETITION.

———— Certiorari—Lord Mayor's Court 200
See LORD MAYOR'S COURT.

———— Damages under Cairns' Act 429
See DAMAGES UNDER CAIRNS' ACT.

———— Dismissal of bill as to all Defendants—Appeal by one .. 493
See MISREPRESENTATION IN PROSPECTUS. 1.

———— Evidence—Withdrawal of affidavit 220
See AFFIDAVIT, WITHDRAWAL OF.

———— Fiat on Petition of rehearing—Appeal from order at Chambers, or on motion 428
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PRACTICE—Interrogatories by Defendant—Affidavit of documents .. 809
See INTERROGATORIES BY DEFENDANT.

———— Production of documents for inspection by witness 818
See PRODUCTION OF DOCUMENTS.

———— Rehearing of appeal—Fresh documentary evidence 443
See DISPOSITIONS BEFORE WINDING-UP ORDER.

———— Revivor by Defendant—Bankruptcy of Plaintiff 407
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———— Settled Estates Act—Lunatic—Permission for committee to consent 229
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———— Special case—Declaration as to future rights 93
See DECLARATION AS TO FUTURE RIGHTS.

———— Stay of proceedings pending appeal to the House of Lords 564, 812
See STAY OF PROCEEDINGS. 1, 2.

———— Taking bill off file—Person of unsound mind 732
See NEXT FRIEND.

PRE-EMPTION—Surplus lands—"Land in a town" 377
See LANDS CLAUSES ACT. 1.

———— Surplus lands—"Purposes of the Act" 745
See LANDS CLAUSES ACT. 2.

PRE-NUPTIAL CONTRACT—Wife's chose in action—Reduction into possession 220
See CHOSE IN ACTION OF WIFE.

PREFERENCE SHARES—Payment of dividend in—*Ultrà vires* 262
See DIVIDENDS, PAYMENT OF, IN PREFERENCE SHARES.

PREMIUM, Return of 369
See RETURN OF PREMIUM.

PRIORITY—Mortgage by building society 576
See BUILDING SOCIETY.

———— Mortgage of share in a newspaper .. .. : .. 703
See NEWSPAPER.

———— Mortgage of ship and freight 597
See FREIGHT, ASSIGNMENT OF.

———— Patent, publication of—Public user 429
See INFRINGEMENT OF PATENT.

———— Possession under mining license 524
See MINING LICENSE.

PRIVATE CHARITY—*Charitable Trusts Acts*, 1853 *and* 1855—*Power of Revocation—Charity Commissioners—Accounts.*] A testator gave a fund to trustees in trust to apply the income in supporting a school which he had founded; but gave power to the person for the time being entitled in possession to his devised estates to revoke the trusts, and divert the fund to other purposes. The tenant for life of the devised estates had become the sole trustee. When called upon by the Charity Commissioners to render accounts of the application of the income for two years preceding the application, he refused to render them, alleging that the Commissioners had no jurisdiction, inasmuch as the charity was a private charity, which he had power to discontinue. He did not allege that he had exercised the power of revocation, but stated that he had applied the income for the purposes of the school:—

Held (reversing the decision of *Malins*, V.C.), that assuming the

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power of revocation to be valid, the fund, until the power was exercised, was devoted to charity, and was an endowment within the *Charitable Trusts Acts*, and that the Commissioners therefore had jurisdiction to call for the accounts.

In re SIR ROBERT PEEL'S SCHOOL AT TAMWORTH. *Ex parte* THE CHARITY COMMISSIONERS 543

PRIVITY OF CONTRACT in successive sales on *Stock Exchange* 188, 388, 764
See CUSTOM OF STOCK EXCHANGE. 1, 2, 3.

PROCEEDS OF SALE of Estate—Power of appointment over, whether executed by appointment of estate 47
See DEFECTIVE EXECUTION OF POWER.

PROCEEDS OF SALE OF REAL ESTATE—*Married Woman—Fines and Recoveries Act*—3 & 4 *Will.* 4, *c.* 74.] Land was held by the trustee of a will upon trust for sale and for immediate division of the proceeds among the testator's children, two of whom were married women. By a deed, in which the *cestuis que trust* joined, the trustee became the purchaser of the estate at the price therein named. The two married women and their husbands concurred in the deed, but it was not acknowledged under the *Fines and Recoveries Act*. The husbands received their wives' shares of the purchase-money :—

Held (affirming the decision of *Stuart*, V.C.), that the deed was inoperative as against one of the daughters who had survived her husband.

FRANKS *v.* BOLLANS 717

2. ——— *Mortmain — Charity — Apportionment—Charge on Realty and Personalty.*] A legacy payable out of personalty and of the proceeds of the sale of real estate, is an interest in land within the *Statute of Mortmain*, and cannot, whilst it remains unpaid, be bequeathed by the legatee for charitable purposes.

Nor can there be any apportionment, so as to make that part of the legacy which would be paid out of personalty available for the charitable bequest.

Order of the Master of the Rolls affirmed.

Marsh v. *Attorney-General* (2 J. & H. 61) and *Shadbolt* v. *Thornton* (17 Sim. 49 ; 13 Jur. 597) observed upon.

BROOK *v.* BADLEY 672

PRODUCTION OF DOCUMENTS—*Inspection of Documents by Witnesses—Practice.*] An application before decree to have documents produced for inspection to intended witnesses is a special application, and only to be made on special grounds.

Where Defendants did not by their answer deny the genuineness of a deed, but merely stated that they did not know whether they had executed it, and after an ordinary inspection applied for an order allowing inspection of it by witnesses, which application was not supported by any affidavit as to the deed being forged, but only by an affidavit of the Defendants' solicitor to the effect that he was advised and believed that it was necessary to his clients' case that the deed should be so inspected by witnesses :—

Held (reversing the order of the Master of the Rolls), that an order for inspection by witnesses ought not to be made.

BOYD *v.* PETRIE 818

——— Interrogatories by Defendant—Affidavit of documents 809
See INTERROGATORIES BY DEFENDANT.

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PROOF AGAINST JOINT AND SEPARATE ESTATE—*Surety.*] *W.*, the treasurer of a union, lodged the union moneys to his account as treasurer at a bank in which he was a partner. The partners assigned their property to trustees to be administered as in bankruptcy. The guardians of the union called on *W.*'s sureties to pay the balance due from him, and they paid it. The sureties then received a dividend on a proof made in *W.*'s name against the joint estate. After this they claimed to prove against *W.*'s separate estate :—

Held (reversing the decision of the Commissioner), that the claim must be rejected, without prejudice to any application to expunge the joint proof, and substitute a proof against the separate estate.

Ex parte CARNE. *In re* WHITFORD 463

PROOF IN BANKRUPTCY—Retainer by executor after proof 195
See RETAINER BY EXECUTOR.

PROOF IN WINDING-UP—Creditor holding security 769
See CREDITOR HOLDING SECURITY.

PROSECUTION OF BANKRUPT—*Bankruptcy Act*, 1861, *ss.* 221, 223 —*Evidence*—*Costs.*] Where there is reasonable evidence to go to a jury of a bankrupt having committed offences within the *Bankruptcy Act*, 1861, *s.* 221, a prosecution will be directed, and the Court will not try the question whether the evidence is sufficient to induce a jury to find him guilty, though a prosecution will not be directed on mere suspicion.

The costs of a successful appeal from an order of the Commissioner refusing to direct a prosecution cannot be ordered to be paid out of the Chief Registrar's account; for having been incurred before a prosecution has been directed, they are not "expenses incurred by such prosecutor" within the meaning of sect. 223.

Ex parte STALLARD. *In re* HOWARD 408

2. ——————————— *Costs—Bankruptcy Act*, 1861, *s.* 223.] The Commissioner of a district Court of Bankruptcy made an order directing the assignee to be the prosecutor in criminal proceedings against the bankrupt for offences under the 221st section of the *Bankruptcy Act*, 1861, but stating it not to be intended by the Court, or required by the assignee, that the extra costs should be paid out of "The Chief Registrar's Account," and ordering them to be paid out of the bankrupt's estate, and if that was insufficient, by the prosecutor. At the same time a certificate in common form was granted, under the 223rd section of the Act, not referring to the order, nor imposing any condition :—

Held (reversing the decision of the Commissioner) that, notwithstanding the order, as an unconditional certificate had been given in the form required by the Act, the costs must be paid out of "The Chief Registrar's Account":

Held also, that the assignee's costs of the appeal ought also to be to be paid out of the same account.

Ex parte SPOONER. *In re* HAMMOND 259

PROVISION FOR DEBTS—Accumulations for—Thellusson Act .. 691
See ACCUMULATIONS.

PROVISIONAL LIQUIDATOR—*Companies Act*, 1862, *s.* 85.] A provisional liquidator will not in general be appointed before the hearing of a winding-up Petition not presented by the company, unless the Court is satisfied that the Petition is unopposed.

In re CILFODEN BENEFIT BUILDING SOCIETY 462

PUBLIC CONVENIENCE—*Statutory Obligation—Mandatory Injunction—Railway Company.*] A local board of health withdrew its

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opposition to a railway bill upon the insertion in the Act of a clause providing that no bridge carrying a road over the railway within their district should have an approach with a slope of more than 1 in 30. The making a slope of 1 in 30 required an encroachment on the land of a person who obtained an injunction to prevent such encroachment, and the company thereupon made a bridge with a slope of 1 in 20 :—

Held (reversing the decision of *Stuart*, V.C.), that the company must not have a bridge with a slope of more than 1 in 30, and that it was no answer to say that this requisition could not be complied with without stopping the railway.

The principles of the Court as to granting mandatory injunctions considered, with reference to the difference between cases of nuisance and cases of contract, and to the suit being by an individual or by the Attorney-General.

ATTORNEY-GENERAL *v.* MID-KENT RAILWAY COMPANY AND SOUTH-EASTERN RAILWAY COMPANY 100

PURCHASE OF SHARES—Specific performance 188, 388, 764
See CUSTOM OF STOCK EXCHANGE. 1, 2, 3.

QUALIFIED ACCEPTANCE of shares 633
See ACCEPTANCE OF SHARES. 1.

RAILWAY, Sale of—Vendor's lien 740
See VENDOR'S LIEN AGAINST RAILWAY COMPANY.

———— Scheme of arrangement, under Railway Companies Act, 1867 278
See SCHEME OF ARRANGEMENT.

RAILWAYS CLAUSES ACT, *s.* 16—*Diversion of Footpath.*] The *Railways Clauses Act*, 1845, sect. 16, does not empower a railway company to divert a public footpath so as to place it upon land of which the company has not acquired the ownership.

A landowner sold certain land to a railway company, the purchase to be completed in six weeks, and it was agreed that if the company should "require any additional land of the vendor, adjoining or near the land sold, for the purposes of the railway and works, the same should be taken and paid for by the company" at a certain price per acre :—

Held, that this agreement authorized the company to take adjoining land for the purpose of their works at any time before the period limited by their Act for the completion of the works, and that though their compulsory powers had expired, they could acquire land under the agreement for the purpose of forming a new public footpath in substitution for an old one.

RANGELEY *v.* MIDLAND RAILWAY COMPANY 306

RAILWAY COMPANIES ACT, 1867—Scheme of arrangement .. 278
See SCHEME OF ARRANGEMENT.

———— Certificate of auditors 337
See DIVIDENDS, PAYMENT OF, OUT OF CAPITAL.

RAILWAY COMPANY—Agreement for lease—*Ultrà vires* 656
See AGREEMENT FOR LEASE BY RAILWAY COMPANY.

———— Diversion of footpath 306
See RAILWAY CLAUSES ACT.

———— Pre-emption of surplus lands—Accommodation works—Purposes of Act 745
See LANDS CLAUSES ACT. 2.

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RAILWAY COMPANY—Pre-emption of surplus lands—Derivative owner—Land in town 377
See LANDS CLAUSES ACT. 1.

——————— Statutory obligation—Public convenience .. 100
See PUBLIC CONVENIENCE.

——————— Time for exercising compulsory powers .. 679
See NOTICE TO TREAT.

——————— Vendor's lien—Sale of railway 740
See VENDOR'S LIEN AGAINST RAILWAY COMPANY.

"REASONABLE SUSPICION"—Affidavit of documents 809
See INTERROGATORIES BY DEFENDANT.

RECEIVER—*Creditors' Deed—Bankruptcy Act*, 1861.] The inspectors appointed by a deed of inspectorship registered under the *Bankruptcy Act*, 1861, filed a bill against the debtor, alleging that he was dealing with his assets in a manner contrary to the covenants of the deed; that they were unable to prevent his proceedings; and that irreparable mischief would result from them; and praying for the appointment of a receiver:—

Held (affirming the decision of *Giffard*, V.C.), that the Court had jurisdiction to appoint a receiver, though it might have no jurisdiction to administer the assets.

RICHES *v.* OWEN 820

——————— Estate of deceased lunatic—Adverse claimants .. 175, 719
See DECEASED LUNATIC. 1, 2.

RECITALS — *Incorrect Recitals — No Recitals — Mortgage — Re-conveyance.*] A man cannot be required to execute a deed containing incorrect recitals.

Where all the persons interested in an equity of redemption concur in the deed of re-conveyance, the mortgagee cannot insist on having the dealings with the equity of redemption stated in the deed, or object to the deed because it contains no recitals whatever.

HARTLEY *v* BURTON 365

REDUCTION INTO POSSESSION—Wife's chose in action 220
See CHOSE IN ACTION OF WIFE.

REFERENCE TO OTHER WRITINGS—Statute of Frauds—Agreement by letters 508
See AGREEMENT BY LETTERS.

REFERENCE TO USES, whether it includes a power 614
See POWER, GENERAL.

REFERENTIAL BEQUEST — *Heir-looms — Remoteness—Defeasance—Tenant in Tail—Gift over—As far as the Rules of Law permit—Practice—Appeal—Staying Execution.*] A testator gave chattels to trustees in trust for the person and persons who for the time being should, under the limitations of a certain strict settlement, be in the actual possession of certain estates, to the end that the said chattels might be deemed heir-looms to go along and for ever be used with the same estates as far as the rules of law or equity would permit, but so, nevertheless, as that the same chattels should not, as to the effect or purpose of transmission, vest absolutely in any person who, under the settlement, should become seised of the estates for an estate of inheritance, unless such person should attain the age of twenty-one years, or, dying under that age, should leave issue inheritable under the limi-

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tations of the settlement. The first tenant in tail in possession under the settlement died without issue before he attained the age of twenty-one years:—

Held, that the estate of the first tenant in tail was thereby terminated, but that there were no words which carried over the chattels in that event to any other tenant for life or tenant in tail, and that the chattels therefore passed by the residuary clause in the will.

Although the words "as far as the rules of law or equity will permit" will not correct a gift which in terms infringes the rule against perpetuity, they may be fairly referred to when a construction warranted by the words used is impugned on the ground of inconsistency with the intention of the testator.

Where the Court has decreed chattels to be delivered up, the execution of the decree will not usually be stayed pending an appeal to the House of Lords.

HARRINGTON *v.* HARRINGTON 564

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REGISTRATION—Creditors' deed—Date of ascertaining creditors is registration not execution 232
See ASSENT OF CREDITORS.

REMOTENESS—"As far as rules of law will permit" 564
See REFERENTIAL BEQUEST.

RENEWABLE LEASEHOLDS—*Apportionment of Expenses of Renewal—Tenant for Life and Remainderman.*] A tenant for life of leaseholds for years determinable on lives, obtained, before his estate for life had come into possession, the grant of a reversionary term determinable on a new life, and to commence after the determination of the old term. He came into possession, and afterwards died, having possessed the estate during part of the term created by the new grant:—

Held (varying the decision of *Stuart*, V.C.), that the amount to be paid by the remainderman in respect of the fine and expenses of renewal was to be ascertained by reference to the actual enjoyment of the tenant for life, and compound interest to be computed on the proportion attributable to the remainderman up to the death of the tenant for life, and simple interest from that time until payment.

BRADFORD *v.* BROWNJOHN 711

RESIDUE, Revocation as to share of 301
See BEQUEST OF RESIDUE.

RES JUDICATA—Plea of—Uninrolled decree 1
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RESOLUTION suspending bankruptcy—Right of voting—Trustees .. 823
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RESPONDENTS TO APPEAL—*Practice—Withdrawal of Appeal—Costs.*] Where the Respondents have by letter consented to the withdrawal of a Petition of Appeal, they will not be allowed their costs of appearing on the Appellant's motion for leave to withdraw the Petition.

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RESTRAINING CREDITORS under Railway Companies Act, 1867 .. 278
See SCHEME OF ARRANGEMENT.

RETAINER BY EXECUTOR—*Proof under Bankruptcy—Abandonment of Retainer—Set-off—Legal Personal Representative.*] A bankrupt was indebted to the estate of a testator, and was also entitled as one of the residuary legatees of the same testator, and also to distributive shares as next of kin of three other residuary legatees. The executor of the testator proved the debts under the bankruptcy and received a dividend on the proof:—

Held (reversing the decree of *Malins*, V.C.), that the executor had thereby abandoned the right to retain the debt out of the direct or derivative shares of the bankrupt in the testator's residuary estate.

But *semble*, if the executor had not proved in the bankruptcy, the personal representative of the testator would have been entitled in Equity to retain the amount of the debt against the bankrupt's direct and derivative shares in the residue.

STAMMERS *v.* ELLIOTT 195

RETURN OF PREMIUM—*Dissolution of Partnership.*] The Plaintiff and Defendant entered into partnership as solicitors for a term of seven years, the Plaintiff paying a premium of £800. The Defendant, before entering into the partnership, knew that the Plaintiff was inexperienced and incompetent in his profession, and assigned that reason for requiring the amount of premium which was paid. After the expiration of two years the Defendant complained that the Plaintiff's incompetence was injurious to the business, and called on him to dissolve the partnership; and the Plaintiff thereupon filed a bill praying for a dissolution and for a return of a proportionate part of the premium:—

Held (reversing the decision of *Stuart*, V.C.), that the Plaintiff was entitled to the return of a part of the premium proportionate to the unexpired portion of the term.

ATWOOD *v.* MAUDE 369

REVIVOR AND SUPPLEMENT—*Revivor by Defendant—Bankruptcy of Plaintiff after Decree—Practice.*] Where a sole Plaintiff becomes bankrupt after decree, and his assignees decline to revive the suit, the Defendant may obtain the common order to revive.

THOMAS *v.* BUXTON 407

REVOCATION as to share of residue 301
See BEQUEST OF RESIDUE.

REVOCATION BY CODICIL—*Will—Specific Legacy—Charge on Real Estate—Revocation.*] A testatrix, by her will, gave to *A.* for life the interest of £300, or thereabouts, invested by her in the *General Steam Navigation Company*, and the interest of £200; and after *A.'s* death she gave the "said principal sum of £500" to *A.'s* children; and she directed that in case of her personal estate proving insufficient for the payment of her legacies such deficiency should be made up out of her real estate by sale or mortgage. By a codicil, she gave "all her personal estate" to *B.*:—

Held, that the whole personal estate passed by the codicil; that the legacy of £300 was specific, and was revoked by the codicil, and that the legacy of £200 was not revoked, but remained charged on the real estate.

Decree of the Master of the Rolls affirmed.

KERMODE *v.* MACDONALD 584

REVOCATION OF CHARITABLE TRUST—Private charity 543
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RIGHT TO TRIAL BY JURY—Patent suit 417
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SALE OF GOODS of company before winding-up order 443
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SALE OF RAILWAY—Vendor's lien 740
See VENDOR'S LIEN AGAINST RAILWAY COMPANY.

SATISFACTION OF MORTGAGE—Building society—Keeping mortgage on foot—Priority 576
See BUILDING SOCIETY.

SCHEME OF ARRANGEMENT, *on whom binding—Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *ss.* 7, 9, 18, 23—*Restraining Actions by Creditors and Landowners.*] A scheme of arrangement under the *Railway Companies Act*, 1867, is not, by sect. 18 of the Act, made binding upon unpaid landowners or general creditors of the company, but only on persons who have assented thereto, or are members of classes which, under the previous sections of the Act, have become bound by the assent of the requisite majorities.

The Court has, however, jurisdiction, under sects. 7 and 9 of the Act, to restrain proceedings by creditors or unpaid landowners during the maturing of the scheme.

This jurisdiction, as regards landowners, is not taken away by the provision in sect. 23 of the Act, that nothing "hereinbefore contained" shall affect the claims of landowners, the word "hereinbefore" being, upon the true construction of the clause, not referable to all the preceding sections of the Act, but only to the preceding part of the same section.

The Court will not restrain proceedings by a creditor or unpaid landowner, unless the scheme makes reasonable provision for the payment of the claims of creditors and landowners.

Order of *Wood*, V.C., affirmed with variations.

In re CAMBRIAN RAILWAYS COMPANY'S SCHEME 278

SECRET TRUST—*Mortmain—Will.*] A testatrix devised the residue of her real estate, not applicable under her will to the purpose of mortmain, to *A.*, and *B.* his son, as joint tenants. A bill was filed impeaching the devise to *A.* and *B.* on the ground that the testatrix had made the devise to them on a secret trust for charitable purposes:—

Held, that the onus lay upon the Plaintiffs to shew that a trust for charity was communicated to, and expressly or tacitly accepted by the devisees, and that the Plaintiffs had failed upon the evidence to make out this case.

Decree of the Master of the Rolls reversed.

Wallgrave v. *Tebbs* (2 K. & J. 313) approved.

JONES *v.* BADLEY 362

SECURITIES FOR BILLS *of Exchange—Bill of Exchange—Acceptor guaranteed by Third Party—Equity of Holder of the Bill to have the Benefit of the Guarantee.*] *M.* drew bills upon the *B.* & *A.* company; and a banking company, under an agreement with *M.*, guaranteed the acceptors (also a company) that they would supply them with funds to meet the bills. *S.* discounted the bills, being informed by *M.* of the

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guarantee of the banking company, but he gave no notice to the banking company or to the acceptors. Afterwards the banking company and the acceptors suspended payment and were wound up. *M.* also executed a deed of composition with his creditors.

Held (affirming the decision of the Master of the Rolls), that *S.* had no equity to rank as a creditor of the banking company in respect of the guarantee.

Inman v. *Clare* (Joh. 769), and *In re Agra and Masterman's Bank* (Law Rep. 2 Ch. 391) distinguished.

In re BARNED'S BANKING COMPANY. *Ex parte* STEPHENS .. 753

SET-OFF—Debt and share of residue—Retainer by executor 195
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SETTING UP IN BUSINESS—Advancement of married daughter—Husband's debts 622
See ADVANCEMENT.

SETTLED ESTATES ACT—*Lunatic—Practice.*] The committee of a lunatic must obtain the permission of the Court of Lunacy before he consents to an application to the Court of Chancery under the *Leases and Sales of Settled Estates Act.*

In re WOODCOCK'S TRUSTS 229

SETTLEMENT by Court, Form of—Ultimate limitation 215
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SHAREHOLDER CREDITORS—Position of, in winding-up 167
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SHELLEY'S CASE—Rule in—*Cy-près* 93
See CY-PRÈS.

SHIP—Assignment of freight—Completion of voyage 597
See FREIGHT, ASSIGNMENT OF.

—— Mortgage—Creditors' suit—Law of *Louisiana* 479
See FOREIGN COURT.

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SIGNATURE BY ONE LIQUIDATOR—Bill of exchange accepted by one of four liquidators 651
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SOLICITOR—Liability of one partner for money received by another .. 646
See FIRM OF SOLICITORS.

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———— of committee of lunatic—Estate of deceased lunatic 719
See DECEASED LUNATIC. 2.

SOLICITOR'S LIEN—*Bankruptcy of Plaintiff—Change of Solicitor—Papers in the Cause.*] The Plaintiff in a suit became bankrupt, and the suit was revived by his assignee, who employed a different solicitor. A decree was afterwards made:—

Held (affirming the order of *Giffard*, V.C.), that the solicitor of the

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original Plaintiff must produce the documents in his possession which were necessary for drawing up the decree, notwithstanding his lien on them for costs, even though the documents were not strictly in evidence in the cause.

SIMMONDS *v.* GREAT EASTERN RAILWAY COMPANY 797

2. SOLICITOR'S LIEN—*Winding-up—Set-off—Companies Act*, 1862, s. 163.] The liquidators of a company brought an action against *S.*, in which the Defendant obtained judgment with costs. *S.* was indebted to the company in a larger amount on a bill of exchange. The costs of *S.*'s attorneys in the action being unpaid, they proceeded in his name to levy execution. The execution was stayed under an interim order in the winding-up, a sum being retained by the liquidators sufficient to meet the costs for which the judgment had been signed. *Stuart*, V.C., held that the solicitor's lien could not prevail against the right of set-off, and granted an injunction to restrain *S.* from proceeding with the execution, and discharged the liquidators from retaining the sum set apart:—

Held, on appeal, that, apart from the *Companies Act*, 1862, s. 163, there was at common law no right to set off the debt on the bill of exchange against the judgment; that the solicitors had a lien on what could be recovered by the execution, and that they had the same right against the sum set apart which represented the proceeds of the execution:—

Held, also, that if the *Companies Act*, 1862, s. 163, applied to such a case and made the execution void (as to which *quære*), this Court would put the Defendant and his solicitors in the same position as if the execution were not so restrained:—

Held, therefore, that the solicitors must be paid their costs out of the sum set apart.

In re BANK OF HINDUSTAN, CHINA, AND JAPAN. *Ex parte* JOSEPH MACKRILL SMITH 125

SPECIAL CASE—Declaration as to future rights—Practice 93
See DECLARATION AS TO FUTURE RIGHTS.

SPECIALTY DEBT—*Breach of Trust—Acknowledgment by Deed under Seal.*] A defaulting trustee, under a will, executed a deed under seal, whereby, after reciting that he held in his hands trust moneys to a certain amount, which he proposed to secure by a mortgage on his own estate, he conveyed certain property to the *cestuis que trust* by way of mortgage. The deed contained a proviso for redemption and a power of sale, but no covenant to pay the mortgage debt or interest. The mortgaged estate was insufficient to cover the debt:—

Held (reversing the decision of *Stuart*, V.C.), that the deed did not convert the debt into a specialty debt.

ISAACSON *v.* HARWOOD. BROOK *v.* HARWOOD 225

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See DISCHARGE FROM PRISON. 2.

25 & 26 Vict. c. 89, ss. 35, 98 119
See OFFICIAL LIQUIDATOR.

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———————, s. 133 651
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30 & 31 Vict. c. 127, ss. 7, 9, 18, 23 278
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See AGREEMENT FOR LEASE BY RAILWAY COMPANY.

STAYING EXECUTION—Winding-up—Companies Act, 1862, s. 163 .. 125
See SOLICITOR'S LIEN. 2.

STAY OF PROCEEDINGS—*Appeal to House of Lords—Delivery up of Chattels.*] Where the Court has decreed chattels to be delivered up the execution of the decree will not usually be stayed pending an appeal to the House of Lords.
HARRINGTON *v.* HARRINGTON 564

2. ——————— *Appeal to the House of Lords—Irreparable Injury—Practice.*] The business of a solicitor had been carried on by a succession of firms in a particular house for thirty years. Eventually, the Plaintiff and Defendant, who were the last continuing partners, dissolved partnership, and the Plaintiff filed a bill against the Defendant, and obtained a decree, which he immediately inrolled, declaring that the Defendant had no interest in the house, and restraining him from entering it. The Defendant being about to appeal to the House of Lords against the decree, moved to suspend the injunction pending the appeal:—
Held (reversing the order of *Stuart*, V.C.), that the case was one in which irreparable injury might be done to the Defendant; and, the Defendant undertaking to proceed with the appeal with due diligence, and to abide by any order as to damages which the Court might make, the Court suspended the injunction pending the appeal.
WALFORD *v.* WALFORD 812

STOCK EXCHANGE, Custom of, as to share contracts 188, 388, 764
See CUSTOM OF STOCK EXCHANGE. 1, 2, 3.

STOPPAGE IN TRANSITU—*Ship chartered by Purchaser—Money paid under Policy of Insurance.*] A merchant in *Sweden* contracted to sell timber to *B.* in *England*; *B.* chartered a ship to fetch the timber, and insured it. The timber was damaged during the voyage, and before it arrived in *England*, *B.* had failed. The merchant in *Sweden* thereupon gave notice to the captain of the ship to stop the timber:—
Held (varying the decree of *Wood*, V.C.), that the merchant in *Sweden* was entitled as against the other creditors of *B.* to the proceeds of the sale of the timber, but not to money which had been paid for the damage under the policy of assurance.
BERNDTSON *v.* STRANG 588

SUBDIVISION OF SHARES—Tracing subdivided shares 131
See ILLEGAL ISSUE OF SHARES.

SUBSTITUTED SECURITY—Assignment of property—Act of bankruptcy 515
See FRAUDULENT ASSIGNMENT.

SUBSTITUTED SERVICE—Bankruptcy—Absconding debtor 252
See PETITIONING CREDITOR. 2.

SUBSTITUTION OF LEGACY for residuary share 301
See BEQUEST OF RESIDUE.

SUIT IN EQUITY RESTRAINED—*Interpleader—Injunction.*] Proceedings in one suit in equity may be restrained by an injunction obtained in another suit.
Where there are two claimants to a fund, and one files a bill against the stakeholder without making the other a party, the stake-

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holder may file an interpleader bill and restrain the proceedings in the former suit.
Order of *Malins*, V.C., discharged.
PRUDENTIAL ASSURANCE COMPANY *v.* THOMAS 74

SUPERVISION ORDER—*Voluntary Winding-up—Discretion of Court — Companies Act*, 1862, *ss.* 147, 149.] The Court will not, in general, at the instance of a contributory, interfere with a voluntary winding-up by ordering it to continue under supervision, unless there has been fraud or undue influence in passing the resolution.
Decision of the Master of the Rolls reversed.
In re BEAUJOLAIS WINE COMPANY 15

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SURVIVORSHIP OF WIFE—Wife's chose in action—Dissolution of marriage 220
See CHOSE IN ACTION OF WIFE.

SUSPENDING BANKRUPTCY—*Proceedings—Bankruptcy Act*, 1861, *s.* 110—*Right to Vote—Trustees.*] Trustees who were carrying on a trade and had been admitted to prove in bankruptcy for a debt on behalf of their *cestuis que trust*:—
Held, entitled to vote on a resolution for a suspension of proceedings under the 110th section of the *Bankruptcy Act*, 1861.
Ex parte PROTHERO. *In re* BARFOOT 823

SUSPENDING PROCEEDINGS—Discharge—Examination of bankrupt 610
See DISCHARGE. 1.

TACKING—Mortgage by building society 576
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TAKING BILL OFF FILE—Next friend of person of unsound mind .. 732
See NEXT FRIEND.

TENANCY IN COMMON under gift of annuity 183
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See RENEWABLE LEASEHOLDS.

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TIME—Creditors' deed—Date when creditors to be ascertained is registration, not execution 232
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See "POSSESSION."

TITLE DEEDS, Custody of—Estate of deceased lunatic 175
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TRANSFER OF SHARES—*Transfer to a Limited Company—Power of Limited Company to hold Shares—Transfer in blank—Registration of Company as Shareholder after Commencement of its Winding-up—*

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Companies Act, 1862, s. 153.] A limited company may become a shareholder in another limited company, if authorized by its own memorandum and articles of association to do so.

A transfer was executed by *P.* to company *C.* of shares in company *B.* The intention of both parties was, that *P.* should transfer and company *C.* accept all the shares which *P.* held. At the time when *P.* executed the deed and handed it to his agent, it contained no description of the shares. Before it left his agent's hands it was filled up with the number of the shares, being all *P.'s* shares, and with a description of them as shares in company *B.*, but the denoting numbers of the shares were not inserted. The seal of the *C. Company* was then affixed to it. The denoting numbers of the shares and the date of the transfer were afterwards filled in, it was handed in for registration, and the *C. Company* were registered as shareholders :—

Held, that the transaction was not invalidated by the fact of the deed of transfer having been executed in an incomplete form, and that the *C. Company* were liable as shareholders.

The seal of the *C. Company* was affixed without any resolution of the board of directors, but by the direction of the three persons who had the chief management of the affairs of that company :—

Held, that it must be considered as affixed by due authority.

After the deed of transfer had been sent in for registration, but before it had been registered the winding up of the *C. Company* commenced :—

Held, that the validity of the registration of the *C. Company* as shareholders was not affected by the *Companies Act*, 1862, s. 153.

In re Barned's Banking Company. *Ex parte* The Contract Corporation 105

TRANSFEREE OF SHARES—Infant transferee .. .. 458, 459, n.
See Infant Transferee. 1, 2.

——————————— Custom of *Stock Exchange* .. 188, 388, 764
See Custom of Stock Exchange. 1, 2, 3.

TRIAL BY JURY—*Legal Right—Patent Case—Practice.*] The Defendant to a bill for an injunction to protect a legal right cannot *ex debito justitiæ* require to have such right tried by a jury; for the Court, before the statutes 21 & 22 Vict. c. 27, and 25 & 26 Vict. c. 42, sent such cases to be tried at law, not in order that they might be tried by a jury, but because the Court, having no jurisdiction to try a legal right, required to have the judgment of a Court of common law upon it.

Application for a jury in a patent case refused.

The decision of the Master of the Rolls affirmed.

Bovill *v.* Hitchcock 417

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———, Secret—Acceptance of 362
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TRUSTEE—Notice of equitable assignment—Casual knowledge .. 488
See Notice of Assignment.

TRUSTEE FOR COMPANY—*Winding-up—Indemnity of Trustee—Trustee ranking as Creditor of the Company for Calls on Shares.*] *M.* was the registered owner of 100 shares in the *T.* company, but he really held them as the nominee and trustee of the *N.* company, and had executed a declaration of trust accordingly. Both the companies being in liquidation, calls to a large amount were made upon *M.* in respect of the shares, which calls he did not pay :—

Held (affirming an order of *Stuart*, V.C., made on *M.'s* applica-

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tion), that *M.* was entitled to rank as a creditor of the *N.* company for the amount of the calls which had been made upon him, and interest thereon, and also for any future calls on the same shares and interest thereon, he undertaking that the liquidator of the *N.* company should be at liberty to pay over to the liquidator of the *T.* company the dividends payable from time to time in the liquidation of the *N.* company to *M.* in respect of the calls, and the liquidator of the *T.* company consenting to accept what might be so paid or payable, in full satisfaction of all claim against *M.* or his estate, in respect of the 100 shares.

In re NATIONAL FINANCIAL COMPANY. *Ex parte* ORIENTAL COMMERCIAL BANK 791

——————————— Garnishee 787
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TRUSTEES—Resolution suspending bankruptcy—Right of voting .. 823
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TRUSTEES' COSTS—Trustees refusing to account 622
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UNJUST RESOLUTION OF CREDITORS—*Bankruptcy Act*, 1861, *s.* 136—*Unjust and Inequitable Resolution—Costs.*] The trustee of a creditors' deed took possession of a house which belonged to the debtor, and of which the debtor had the key. The debtor brought an action against him for assault, for conversion of certain tools in the house, and for breaking into the house, and obtained a verdict on the first two grounds, but failed on the third. The trustee included in his accounts the costs paid by him to the Plaintiff, and his own costs of the action; and the accounts were approved by a majority in number and value of the creditors assembled in a meeting called for the purpose of examining them. A creditor afterwards applied to the Commissioner to have these items disallowed, and to oblige the trustee to pay a further dividend:—

Held (affirming the decision of the Commissioner), that the costs must be allowed, for that the resolutions mentioned in the *Bankruptcy Act*, 1861, s. 136, need not be resolutions come to before the Commissioner, and that there was nothing so unjust or inequitable in a resolution sanctioning the allowance as to authorize the Court to pronounce it not to be binding.

Ex parte PILKINGTON. *In re* WEBSTER 404

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UNCERTAINTY OF AGREEMENT — Agreement referring to other writings—Statute of Frauds—Specific performance 508
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Therefore where a landowner had sold land to a railway company, on some of which they had entered, under the 85th section of the *Lands Clauses Act*, and on the rest under an agreement with the vendor, and the vendor had obtained a decree for specific performance and for payment of the purchase-money within three months:—

Held (affirming the decree of *Malins*, V.C.), that, in default of payment the vendor was entitled to a sale of the land, although the railway was actually made, and ready for traffic.

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